

# **Free as Air to Common Use**

An Intellectual History of Public Domain in Science and Useful Arts

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## **Abstract**

This thesis is about the intellectual history of the modern debate on the public domain and the question about ownership of information and culture through intellectual property rights. The beginning of this debate is often said to be David Lange's 1981 article "Recognizing the Public Domain." What Lange called for was a recognition of individual rights in the public domain, also in cases where a recognition like this would offset new intellectual property rights. Lange did not provide a general theory on the public domain, and his article is perhaps better understood as a makeshift criticism of the conventional intellectual property doctrine. Nevertheless, over the next twenty years the debate can be said to have developed from a rudimentary critique of intellectual property to a positively defined social theory of the value of a strong public domain and of openness in society in general. It is this development — this academic history — I will try to trace, analyse and categorise in this thesis.



## Acknowledgements

The story of this thesis is a story of inspiration and encouragement. The number of people that have inspired me to write this is way too extensive to be fitted on a single page. For inspiring, motivating, and encouraging me, I owe you my deepest gratitude.

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No less true for being routine, as Frye has written (or being poached, as in my case), the many virtues of this thesis are due to others, the errors of fact, taste, logic, and proportion are poor things, but my own.

Oslo, May 15th 2009



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## Introduction

# The Unauthorised Parody

In March 2009, the Israeli artist Kutiman uploaded a music collage in eight movements on the video publishing web site YouTube. Created entirely from other videos posted on YouTube, Kutiman's "Thru-you" is one of the first examples of an art form that was inconceivable just a few years ago. At the same time it raises a number of questions. Kutiman's reuse is shamelessly blatant. Does that make Kutiman a poacher, merely heisting other peoples property; or is reuse the essence of all art, simply less conspicuous in other art forms?

Another example is Alice Randall's novel *The Wind Done Gone*, which is a parody of Margaret Mitchell's more famous novel *Gone with the Wind*. Randall's remake is told from the perspective of Scarlett O'Hara's mulatto half-sister Cynara, who is a slave at Scarlett's plantation. Before the book could be published, however, the Mitchell estate sued Randall and her publishing company, and got an injunction against publishing the book. Benkler: "In 2001, more than fifty years after Margaret Mitchell died, and years after the original copyright for the book would have expired under the law in effect when Mitchell wrote it, a federal district judge ordered Randall's publisher not to publish *The Wind Done Gone*."<sup>1</sup>

Randall's parody was ultimately published, but just as Kutiman's mashup "Thru-You," the case raises important questions about cultural ownership. What parts of the novel *Gone with the Wind* are unique enough to warrant the Mitchell estate's exclusive ownership? Can one write a book about a woman named Scarlett, or is that mere duplication of Mitchell's work? What about write about family life at a plantation in Georgia? Or about love? Arguably, it is impossible to write a book that does not draw upon impulses from other authors. In the same way, it is very hard to invent something without building upon what others have built before. Or, as Isaac Newton put it, standing upon the shoulders of giants. An extreme example is language. It is really hard to write a book that does not use words other people have used before.

In terms derived from intellectual property law, these questions are related to questions about what is in the "public domain," and what is protected by intellectual property rights like patents, copyright, trademark, etc. Over the last few years we have seen a spike in the attention given to these issues. From

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<sup>1</sup>Yochai Benkler, "Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain", *Law and Contemporary Problems* 66, 2003, p. 173.

the Napster lawsuit in 2001 to the Pirate Bay trial in 2009, public interest in issues regarding cultural ownership has virtually exploded. Led on by participatory web sites such as Wikipedia, Flickr, Facebook, MySpace, Twitter, Pirate Bay, and, as mentioned, YouTube, a movement claiming a new take on creativity has emerged. On one hand, this “free culture movement” is a “cultural environmentalism,” a preservationist movement for the digital age. On the other hand, it is a political movement claiming a reconfiguration of the laws relating to culture.

Behind this aesthetic and political movement is an analytic framework that was developed in the 1980s and 1990s, especially by American copyright law scholars. This *debate* or *argument* is characterised by its attempt to understand the nature and role of public domain better. The substantive problem which provided the orientation for this study was therefore that of making intelligible what appeared to be a recurring pattern of attitudes toward public domain and the value of common access to knowledge and information on the part of American law scholars in the 1980s and 1990s, and how this pattern spread into other disciplines to form a social theory on public domain by the early to mid-2000s.

The intellectual history of this social theory has not been studied extensively, and the few examinations that can be found are usually limited to the length of a footnote or at most a few paragraphs in an introduction. From these limited treatments, however, a general understanding of the typical take on this debate can be inferred: The honour of beginning the debate is usually attributed to David Lange’s prescient 1981 article “Recognizing the Public Domain.” Then nothing much happened until Jessica Litman wrote “The Public Domain” in 1990, which was followed by the work of people like L. Ray Patterson, Stanley W. Lindberg, Peter Jaszi, James Boyle, Jerome H. Reichman, Mark Rose, and Pamela Samuelson. Some of these people, most notably Boyle, Litman, Lange, and Samuelson, continued their work on the public domain into the 2000s, and were joined by new people like Yochai Benkler, Lawrence Lessig, Siva Vaidhyanathan, Debora J. Halbert, and Julie E. Cohen.

My argument is that the development of the use of the term “public domain” is more complex than this. I agree that the debate began in 1981. Not because Lange was the first to study the public domain, but because he seems to have been the first to pay direct attention to it. Few, if any, focused solely on the public domain before 1981. My main disagreement with the typical take on the history of the modern debate on the public domain is that it fails to acknowledge the “old” in all the “new.” This might seem strange, seeing that one of the most common arguments within the debate is the recognition of inspiration and reuse.

But the reason is not so much nonsensical inconsistency as shortness. There is not much room in a few paragraphs. Still, a pinch more precision could have been fitted into the same space. This is my suggestion:

David Lange's 1981 article "Recognizing the Public Domain" is widely acknowledged as the first article to study the public domain explicitly. Through the 1980s, 1990s and early 2000s, his approach was continued and expanded upon by (1) detaching the public domain discourse from the discursive field of intellectual property law, and (2) associating the public domain with a number of different arguments related to information and knowledge. This *embedding* of the public domain in, among others, information economics (Grossman and Stiglitz), institutional economics (Ronald Coase), aesthetics (Northrop Frye), political philosophy (Jürgen Habermas), and cultural anthropology (Lewis Hyde) vastly expanded the scope and significance of the public domain discourse.

Taking this as my point of departure, my argument is that the concept of the public domain, although it certainly existed in 1980, was reconstructed throughout the eighties and nineties and placed squarely in the center of what I have called a social theory on free culture and immaterial rights in the public domain. Moreover, I believe Jonathan Lethem's 2007 essay "The Ecstasy of Influence" is emblematic of this new social theory. Compared to the discussions about the public domain in the 1970s, Lethem's essay is eloquent and persuasive almost to a fault, and it rests upon a coherent and systematic study of the subject. The essay could therefore be seen as the culmination of that which Northrop Frye called the "consolidating progress which belongs to a science."<sup>2</sup> To Lethem, culture is not authored by creative genius working in isolation. Rather, culture is accumulative, and authoring has more to do with rearranging, reshaping and rephrasing than solitary pioneering. Fittingly, Lethem used Mary Shelley's words, and wrote: "Invention, it must be humbly admitted, does not consist in creating out of void but out of chaos."<sup>3</sup> Based on this, Lethem argued that the prerequisite of culture — the *sine qua non* of creativity — is a strong public domain, and that intellectual property should be subordinated to the right to reuse.

By tracing the development of the modern debate on the public domain, the aim of this thesis is to interpret, analyse and categorise some of the foundational ideas of a field and a politics I believe might become the most important issue of the 21st century. The challenges related to information, knowl-

<sup>2</sup>Northrop Frye, *Anatomy of Criticism - Four Essays*, (Princeton (NJ): Princeton University Press, 1957), p. 8.

<sup>3</sup>Jonathan Lethem, "The ecstasy of influence - A plagiarism", *Harper's Magazine* 314, 2007, p. 61.

edge, privacy and the internet are, in my opinion, likely to define this century as much as the French revolution defined the 18th, the industrial revolution defined the 19th, and what can perhaps be labelled the “battle of ideologies” defined the 20th. Phenomenons like Creative Commons, peer-to-peer file sharing, Wikipedia, YouTube, Flickr, blogs, bioprospecting, and open source are only the beginning of this revolution.

Before I begin my exposition of the modern debate on the public domain, I am first going to discuss the theoretical approach of this thesis, and then briefly sketch the outline of what is to come.

## Theoretical Approach

Broadly speaking, one could argue that the subject of intellectual history is “what people thought.” A sweeping definition like this encompasses an overwhelming amount of thoughts, so I am going to narrow it down. The most important reason, notwithstanding the impossibility of such a study, is that an idiosyncratic study of all that has ever been thought is more or less useless. It is comparable to the map that is a three dimensional replica in a 1:1 scale. To make sense of people’s thoughts through history, it is necessary to generalise and make abstractions, as well as categorise and sort these generalisations.

The kinds of generalisations and abstractions that are most relevant for the intellectual history of the modern debate on the public domain, at least from the point of view that I have chosen in this thesis, are different systems of thought, ideologies and schools. In politics, for example, we have capitalism, fascism, and socialism; in science we have constructivism, liberalism, and structuralism; in art we have cubism, dadaism, and surrealism; and in religion we have agnosticism, atheism, and gnosticism. There are also eponymous schools of thought, like cartesianism, kantianism, and platonism. Espen Schaanning states that the requirements for such a system are (1) that it is a collection of elements ordered into an organised whole, and (2) that it is coherent (i.e. reasonable and consistent).<sup>4</sup> In this chapter, I will discuss these requirements and describe three

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<sup>4</sup>Espen Schaanning, *Fortiden i våre hender - Foucault som vitenshåndtør*, (Oslo: Unipub, 2000) , vol. 1, p. 22.

different kinds of systems of thought, as well as consider a simple theory about associated systems of thought within different frames of references.

## Systems of Thought

According to Ernesto Laclau and Chantal Mouffe, most systems of thought like these are discourses. A discourse is an attempt to fix words and concepts and how these are related to one another as moments of a structured totality. As a result of this, the discourses are not merely a *post hoc* attempt to make sense of people's thoughts through history, but, rather, an articulation created by the participants themselves. The discourses should be seen as a way of organising the multitude of meaning that came into existence with the Weberian disenchantment of the world. Thus, the elements can be seen as fragments of a lost unity, as opposed to the "*natural* organic unity peculiar to Greek culture."<sup>5</sup> In addition to this, however, a discourse is characterised by restraining the participants and limiting their options. An attempt to fix meaning as moments of a structured totality is, by definition, a restriction and a removal of options. As such, a discourse disciplines its participants with regard to the use of concepts and their relationship.<sup>6</sup>

That being the case, a discourse can be said to be an "unintentionally created system of thought." This is a system of thought in which the participants unintentionally articulates the meaning and relation of certain words and concepts. For example, there exist a specific vocabulary and a certain set of conventions regarding the use of this vocabulary in the context of *childhood*. In this context, words like parent, responsibility, and safety have a fixed meaning. They are the junctions and intersections — in discourse analysis called nodal points — of the childhood discourse, and all other meaning in the context of childhood revolve around them. This is also the case in the context of *fashion* (where beauty, trends, and money are some of the nodal points), and in the context of *financial markets* (where risk, credit rating and interest are among the nodal points).

In addition to the unintentionally created systems of thought, however, it is possible to argue that there exists "intentionally created systems of thought." These are similar to the unintentionally created systems of thought in that they try to fix meaning as moments of a structured totality. But, contrary to the unintentionally created systems, the intentionally created systems are not discourses in

<sup>5</sup>Ernesto Laclau and Chantal Mouffe, *Hegemony & Socialist Strategy - Toward a Radical Democratic Politics*, (London: Verso, 1985), p. 94.

<sup>6</sup>Ibid., pp. 96,105.

themselves. Not because they are intentional, but, rather, because they do not discipline their participants in the way a discourse does. This does not mean that intentionally created systems of thought can not influence a discourse, or that they do not exist in the same social space. But before I discuss this influence and interconnectedness I will describe the different kinds of intentionally created systems of thought.

There exists two basic kinds of intentionally created systems of thought. The first is an explicit description of a discourse — an “exposition.” The reason this is an intentionally created system of thought, and not just a description of the discourse, is that the exposition never can be completely accurate. Even if the exposition was perfect (which is virtually impossible), it would still not reflect the original discourse because the description would be frozen in time while the discourse matures and adapts continually. Using Boyle’s words, the discourse could perhaps be described as “an ever-changing scene which folds back onto itself like a Möbius strip.”<sup>7</sup> Also, an exposition cannot discipline its participants. As a result, an intentionally created system of thought is “inactive” or “dead,” at least compared to a discourse which by definition is lively and active. Two examples might explain this better. First, there existed a certain kind of mathematics that analysed phenomena as “games” before John von Neumann coined the term “game theory” and described this as a system of thought in 1944. Von Neumann’s “game theory” was the exposition of the game discourse. Second, there existed a framework of understanding – a discourse — based on the beneficial effects of privatisation and liberalisation before John Williamson coined the term “Washington Consensus” and detailed its inner workings in 1989. Williamson’s “Washington Consensus” was the exposition of the neo-liberal discourse.

The second kind of intentionally created systems of thought shares most of the properties of the exposition (i.e. frozen and non-disciplinary), but differs in its origins. The second kind is not meant as a description of an existing system of thought, but rather an attempt at formulating a “tenet” or a “set of principles.” This means that this kind of system of thought is normative. The first example that comes to mind is a manifesto. One rather obvious example is the Communist Manifesto, which is an intentionally created system of thought, but not a discourse.

As mentioned, this does not mean that unintentionally and intentionally created systems of thought — discourses, expositions and tenets — are not related and

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<sup>7</sup>James Boyle, *Shamans, Software, and Spleens*, (Cambridge (MA): Harvard University Press, 1996), p. 27.

do not exist in the same social sphere. On the contrary, both expositions and tenets can exist within a discourse. Von Neumann's description of the game discourse most likely did influence the discourse on games, even though the exposition was not a discourse itself. The same applies to Williamson's exposition of the neo-liberal discourse. Furthermore, it often happens that the participants in a debate following the publication of a manifesto creates a new discourse. This discourse is related to the manifesto, but it is the discourse that disciplines its participants, not the manifesto. The Communist Manifesto is a good example of this. The manifesto is clearly normative, which makes it a tenet or a set of principles. On the other hand, communism, at least in a general sense, is a discourse, while an intellectual history of marxism is an exposition.

By saying this, I acknowledge that these systems of thought are not "given" in the sense of being a "platonic idea." On the contrary, each system is either an articulation of meaning as an attempt to make sense of the world, in the case of discourses and tenets; or theoretical models we employ to make sense of human thought, in the case of expositions.

Therefore, some of the tasks of the intellectual historian — at least when writing about systems of thought — is (1) to uncover historical systems of thought that people have unconsciously adhered to (i.e. without realising it), (2) to try to reveal the inconsistency and irrationality of "unreasonable" systems of thought through a historical comparison of these systems, and (3) to study the continuity of a tradition as well as historically trace the elements constituting a system of thought. The second point is meant in a manner reminiscent of Quentin Skinner, when he states that "the explanatory problem must always be that of accounting for a lapse of rationality."<sup>8</sup>

The rationale behind this is that such systems control, or at least strongly influence, the conclusions we reach. A system we unconsciously adhere to, or a system that is incoherent and irrational, may distort our understanding of the world. Accordingly, disclosing historical systems of thought might help us understand more about historical events and the choices people have made in the past.

To uncover and describe historical systems of thought, however, entails the creation of an exposition. The reason, as mentioned above, is that it is nearly impossible to make a correct description of a discourse. As a result, one could argue that the whole endeavor is futile, and that any attempt at a description

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<sup>8</sup>Quentin Skinner, *Vision of Politics*, (Cambridge: Cambridge University Press, 2002) , vol. 1, p. 31.

of a historical system of thought has no purpose. In most cases, however, the distortion is too small to corrupt the main dynamic of the system, and the conclusions drawn from the approximate description of the system will be the same conclusions that would have been drawn from a perfect description of the system. What I mean by this is that the exposition created by the historian — at least with a carefully worked out description — will be sufficiently similar to the original discourse for its conclusions to be valid. Having said that, it is still important to remember that any description of a discourse is still just an approximate description, and that this description is not the discourse itself, but a separate exposition. Additionally, it is important to recognise that deviations can come into existence not only through incidental human error, but also through intentional maladaptation. Proponents of certain views may, for instance, persistently overestimate the coherence and soundness of the system of thought that supports their views, and underestimate the appropriateness of a system that goes against their views.

This description of a system of thought as a coherent collection of elements into an organised whole takes no notice of the fundamental norms and premises of the system. This means that a system of thought exist entirely within one *frame of references* or one *set of norms*. In my thesis, I will at talk about common sense, which we recognise from the Copyright Clause in the United States Constitution and has as its goal a general usefulness to society; economics, with a keener set of premises on which to build an argument; aesthetics, which is an approach that comes from within the field of arts and sciences, and thus uses the premises of the arts and sciences themselves to argue about what is good and efficient; politics, which is about the choices we have to take as a society; and moral, which is based on moral philosophy and tends to argue that something is right, wrong or in a morally gray area.

In general, one could argue that the more frames of references an ideology or a politics adheres to, the more reliable and convincing it is. According to Peter Jaszi, for instance, scholars sometimes fail to recognise a “foundational concept for what it is—a culturally, politically, economically, and socially constructed category rather than a real or natural one.”<sup>9</sup> As such, it is often at the confluence of several frames of references that meaning is created. Martha Woodmansee, for example, argues that the concepts and principles central to authorship and copyright achieved their modern form “precisely in the interplay of the [...] le-

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<sup>9</sup>Peter Jaszi, “Toward a Theory of Copyright - The Metamorphoses of ”Authorship””, *Duke Law Journal*, 1991, p. 459.



gal, economic, and social questions on the one hand and the philosophical and esthetic on the other.”<sup>10</sup>

My argument is that a combination of different systems of thought, in which each subsidiary system of thought adheres to individual frames of references, can be of the same three kinds as the individual systems of thought. Such a complex of systems of thought (from now on just complex, for simplicity) can either be intentionally or unintentionally created. And, if it is intentionally created, it can either be normative or descriptive. Because my subject is the study of human societies, I am going to call the descriptive intentionally created complex *a social theory*. Moreover, I will call the normative intentionally created complex either *a politics* or an *ideology*. The unintentionally created complex is in many ways still a discourse, even though it is a composite discourse. This composite discourse is a *discursive field*. A small table may clarify:

	Unintentional	Intentional	Intentional
Simple	Discourse	Tenet	Exposition
Complex	Discursive Field	Politics	Social theory

Based on this terminology, it can be argued that a group of systems of thought is a complex when it has a rather coherent argument within several of the different frames of references. For example, I would say that the mesh of meaning Williamson labelled the “Washington Consensus” is a basic system of thought, or a discourse, when it consists of arguments on the efficiency of a specific economic approach toward developing countries; and that it expands into a complex, or a discursive field, when it incorporates arguments about the moral “rightness” of alleviating poverty through liberalisation, the political aptness of privatisation, as well as the legal appropriateness of these strategies. This is also true for the mesh of meaning related to the modern debate on the public domain. It is a discourse when it only consists of legal arguments, and a discursive field when it incorporates economic, aesthetic, political, and anthropological arguments. Moreover, the collection of expositions amounts to a social theory when they have the same complexity as the discursive field. Finally, a collection of tenets or sets of principles amounts to a politics or an ideology when they maintain a relatively coherent argument encompassing several frames of references.

<sup>10</sup>Martha Woodmansee, “The Genius and the Copyright”, *Eighteenth-Century Studies* 17, 1984, p. 440.

## Terminology

The difference between the public domain and commons can often be a bit difficult to understand, and many times the terms are used interchangeably. The terms derive from its use in intellectual property law, however, and most of the time, public domain usually refers to knowledge, information, and “culture” free for all to use at their own discretion. Or, more eloquently put, free as air to common use. Prominent examples are knowledge of how to use a wheel, how to boil water on the hearth, the boilerplate Hollywood love story (man and woman meet, fall in love, gets into a fight, cries, gets back together, and lives happily until the end of the rolling titles), adding, subtracting, multiplying and dividing, as well as the words “no,” “man,” “is,” “an,” and “island.”

Commons, on the other hand, usually refers to what is either in the public domain or privately owned but available to all through licences. The essence of the commons is that everyone should have equal access, and that nobody has the right to stop others from using it. Therefore, if access is regulated, it has to be regulated equally for everyone. This is what constitutes the cultural — or creative — commons, something that is available to all.

In this thesis I am going to distinguish, at least to a certain degree, between the terms “public domain” and “the public domain.” “The public domain,” *with* definite article, is the legally defined notion of knowledge and information not protected by copyright or patent law; while “public domain,” *without* definite article, is a more general notion of knowledge and information free for all to use at their own discretion. This means that “public domain” is a wider term encompassing both “the public domain” and several kinds of commons.

A noteworthy aspect of the intellectual history of the public domain is how difficult the lack of “property-less” terminology has made it to talk positively about the public domain. As Boyle argued in his introduction to a panel discussion at Google’s *Zeitgeist* 2008, we have a bias toward the enclosed.<sup>11</sup> Why else would Robinson Crusoe build a fence on a deserted island? Eva Hemmungs Wirtén writes: “Even when there is nobody there to keep out, nobody for whom the fence means anything, it makes sense of the island, which without it is just *horror vacui*, a ‘negative space ... in search of a possessive content.’”<sup>12</sup> This bias is

<sup>11</sup>Boyle, James. *Google Zeitgeist 2008*. <http://www.youtube.com/watch?v=FzsRuRO9As> (May 11, 2009)

<sup>12</sup>Eva Hemmungs Wirtén, *Terms of Use - Negotiating the Jungle of the Intellectual Commons*, (Toronto: University of Toronto Press, 2008), p. 24, and Wolfram Schmidgen in *ibid.*, p. 24.

reflected in the English language itself. The most obvious example being the “public domain” itself.

It could be argued that it is more or less counterintuitive to use the term “public domain” to describe “that which is free for all to use at their own discretion,” because “domain” indicates that it is owned by someone. The reason we use it is probably the strong metaphorical connection it has to the physical public domain. According to Merriam-Webster Online Dictionary, the physical public domain is “land owned directly by the government,” while the immaterial public domain is “the realm embracing property rights that belong to the community at large, are unprotected by copyright or patent, and are subject to appropriation by anyone.”<sup>13</sup> What is conspicuous is how the term we use to describe this phenomenon implies ownership in some way or another, even though the definition of it does not. Furthermore, the terminological semblance of the two kinds of public domain gives the impression that there is a strong conceptual connection between the two. Identifying the two as merely the material and immaterial part of the same *public domain*, however, conceals the fact that there are larger differences.

The fact that land is material makes it *exhaustible*. This is contrary to the immaterial public domain, which is *inexhaustible*. In economics, this distinction is usually described through the dichotomy of rival and nonrival goods. That a good is *rival* means that my use of it diminishes your use of it. If I eat an apple, for example, you cannot eat it as well. An apple is therefore *rival*. But if I look at the stars, you can look at the stars too. My use of the stars as a beautiful scenery does not diminish your use. The celestial body is therefore nonrival.

In addition to the rival-nonrival dichotomy, economists often distinguish between goods that are *excludable* and *non-excludable*. That a good is excludable means that it is possible to exclude someone from using it. If I occupy a piece of land, for example, it is taken, and I exclude you. Because of this, many people, or perhaps even most people, agree that land must be owned in one way or another. This consensus is so strong that public domain in its land sense by definition is *owned* by the government.

Moreover, most rival goods are excludable, at least in a strict sense. Fish stocks in international waters, for example, are rival, but it is just about impossible to exclude fishermen (you could also add water and air to this list of rival and non-excludable goods). As a corollary to this one would perhaps expect most nonri-

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<sup>13</sup>Merriam Webster Online Dictionary s.v. “Public Domain.” [December 11, 2008]

val goods to be non-excludable. And this is often the case. Nonrival goods like national defense, radio and TV that is “telecast” and not “cablecast,” street lights, clean air, and lighthouses are not excludable. At the same time, there exists a number of nonrival goods that are excludable. Cable television is still the prime example, but encryption technology has made it more and more feasible to sell individual access to broadcasts. This is also true for web sites. Web sites are non-rival because my use of a web site does not diminish your use (at least as long as server bandwidth is not an issue), but a person can easily be excluded from a web site by adding password protection.

Knowledge and information are the quintessential nonrival goods, at least if we dodge the issue of lessening of value through sharing (“I don’t take anything from you when I copy the way you dress,”<sup>14</sup> writes Lawrence Lessig, but if I do, you might have to get a new dress to be fashionable again). I could continue by arguing that knowledge and information are the quintessential non-excludable goods, but that would be ill-considered. If you have information, it is up to you to decide whether you wish to disclose it or not. In sum, knowledge and information are *non-rival* because my use will not diminish your use, and it is *excludable* as long as it has not been disclosed. In addition to this, knowledge and information can be *excludable* through social policies like immaterial property rights. Knowledge and information in the public domain, on the other hand, are both *nonrival* and *non-excludable*.

## Outline

The subject matter of this thesis is the intellectual history of the debate on the public domain from David Lange’s 1981 article “Recognizing the Public Domain” to Jonathan Lethem’s 2007 essay “The Ecstasy of Influence.” My argument is that the term “public domain” was developed from being a subsidiary concept within intellectual property law in 1981 to the core element of a comprehensive social theory on free culture and immaterial rights in 2007, and my aim is to describe, analyse, and “make intelligible” this development.

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<sup>14</sup>Lawrence Lessig, *Free Culture*, (New York: Penguin Press, 2004), p. 84.

Originally, the idea of the public domain was, as Debora J. Halbert points out, “woven into the fabric of copyright and patent law.” This corresponds to the fact that the nature and role of the public domain was mostly, if not exclusively, discussed within the context of intellectual property law in the 1970s. As such, the social theory on public domain was created by separating the public domain from the intellectual property discourse, embedding the concept into other discourses related to information and knowledge, and — building on what had been acquired from these other discourses — reconceptualising the argument to fit into the greater theme of free culture and immaterial rights. In Halbert’s words, the public domain needed to be “reinvigorated in order to serve a larger public purpose.”<sup>15</sup>

Granted that Lange’s 1981 article “Recognizing the Public Domain” was the beginning of the modern debate on the public domain, the contributions can broadly be categorised into four phases: emergence, deconstruction, anchoring, and realisation. There are no watersheds in the intellectual history of the public domain, however, and each phase seems to have blended almost seamlessly into the next. Moreover, anchoring and realisation are so intertwined that they could just as well be seen as the two main elements in a composite period of reconstruction. Having said that, it is also clear that a number of the contributions to the debate, and most of the contributions I have chosen to write about, can be accurately placed within one of these phases. The structure of this thesis is therefore based on this broad categorisation.

In Part I, which I have called “Discovering the Public Domain,” I will write about the emergence of the modern debate on the public domain. Lange’s 1981 article “Recognizing the Public Domain” was not entirely novel, however. In fact, it can be argued that most of his analysis were similar to analyses put forward in the copyright revision bill debate in the 1960s and 1970s, or, possibly, even earlier. In retrospect it seems clear that Lange’s article did change something, however, and that Lange’s article therefore should be seen as the beginning of a new public domain discourse. As such, Part I is an examination of the novelties of Lange’s article, and a comparison of his argument (1) to earlier views of the public domain and (2) to the general political trends of the 1980s and 1990s.

In Part II, which I have called “Criticising the Notions of Intellectual Property,” I will write about different attempts to reveal and deconstruct notions and illusions regarding intellectual property. In this deconstructive phase, notions like the “romantic notion of authorship” and the “labour justification of property” were

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<sup>15</sup>Debora J. Halbert, *Resisting Intellectual Property*, (London: Routledge, 2005), p. 16.

seen as blocking a true understanding of the nature and role of the public domain. The attempt was to detach the concept “public domain” from copyright and patent discourses through a public domain-based critique of intellectual property law. It is somewhat like the teenager’s detachment from her parents, trying to “find herself.”

In Part III, which I have called “Replacing the Scaffolding and Falsework,” I will write about attempts to moor the public domain debate to other theoretical frameworks. New concepts were embedded into the debate by anchoring their use of the concepts to the external discourses the concepts originated in. Examples include the anthropological study of gift exchange, institutional economics and theories on production processes, and analyses of the value of a public sphere to a democracy. In the analogy, the teenager would no longer be a teenager, but in her twenties, searching for her roots. Contrary to the deconstructive phase, where the typical focus is on the dismantling of what is seen as confusing and even misleading notions, the typical contribution belonging to the anchoring phase is a positive and constructive attempt to create a social theory on the public domain.

In Part IV, which I have called “Appreciating Tinkering,” I will write about the realisation of some of the potential created through deconstruction and anchoring. This phase is therefore characterised by several attempts to create a comprehensive system of thought — a social theory on public domain — that might help us understand the nature and role of the public domain. In addition to these descriptive attempts, however, this phase also saw endeavors to create comprehensive, normative arguments that would be better described by words like *philosophy* or *ideology*. The typical view of the public domain was as an essential component of society itself. Without a strong public domain, the argument goes, we are shut out of the culture we belong to. And without a right to imitate, plagiarise, criticise and satirise, we are at a loss as a society. The question is therefore not *whether* the creator is able to create or not, but what *kind* of society is being created. Tinkering with culture — e.g. by way of playing around with a camcorder, discussing politics with your friends, or writing a satire on an old book — is important because of the kind of society it enables, and the public domain is a prerequisite of this tinkering.

As I mentioned in the introduction, the typical take on the intellectual history of the modern debate on the public domain is generally assigned to a footnote or at most a few paragraphs in an introduction. A few articles and books do discuss the history somewhat more detailed, like Julie E. Cohen’s “Copyright,

Commodification, and Culture,”<sup>16</sup> David Bollier’s “Viral Spiral,”<sup>17</sup> and Debora J. Halbert’s “Resisting Intellectual Property,”<sup>18</sup> but even these are far from treating the intellectual history of the modern debate on the public domain as a historical subject in its own right. There actually seems to have been no extended treatments of the historical aspects of the debate. This certainly inspires a certain degree of humility, and my treatment of the subject will undoubtedly be revised and amended in the coming years — due, not least, to the fact that a rather brief study like this can only reach so far in terms of sources.

It is therefore not without reason that I write “contributions” and not “*the* contributions” above. Even though my subject arguably is rather small — the intellectual history of the modern debate of the public domain — the scope of this thesis is still too little to cover an extensive analysis of “everything.” As a result of this, I have decided to focus on a few key contributions rather than attempting to make an exhaustive list of all that has been said about the public domain through three decades. This has the added benefit of making it possible to undertake an extensive analysis of the contributions I do engage in. Moreover, it is clear that a study of a subject like this, however narrow the subject is in itself, is bound to be limited by the overwhelming amount of background material available. A large part of the development of the modern debate on the public domain was, after all, attempts to anchor the notion of public domain to other analytical frameworks. To be able to describe the public domain debate at all, I have included short descriptions of these other analytical frameworks, but limited these treatments as much as can be justified.

The question that remains to be addressed is how the *key* contributions are selected. My first answer to this question has to do with “belonging.” It can be argued that an article or a book “belongs” more to one discourse than to another. As such, I could claim that none of the earlier contributions “belonged” to a public domain discourse as much as they belonged to a copyright discourse, an ownership discourse, etc. This distinction is important. On one hand, there exists a number of contributions that “belong” to separate discourses but has elements that are relevant for the public domain discourse. On the other hand, there exists some contributions that “belong” to the modern debate on the public domain. For example, Jessica Litman’s 1990 article “The Public Domain,” James Boyle’s 1997 book “Shamans, Software, and Spleens,” Lawrence Lessig’s 2004 book

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<sup>16</sup>Julie E. Cohen, “Copyright, Commodification, and Culture”. In: *The Future of the Public Domain - Identifying the Commons in Information Law*, ed. by Lucie Guibault og P. Bernt Hugenholtz, Alphen aan den Rijn: Kluwer Law International, 2006, pp. 121–166.

<sup>17</sup>David Bollier, *Viral Spiral*, (New York: The New Press, 2008).

<sup>18</sup>Halbert, *Resisting Intellectual Property*.

“Free Culture,” and Jonathan Lethem’s 2007 essay “The Ecstasy of Influence,” are contributions that can be said to “belong” to the public domain discourse, or, at least, belong *more* to the public domain discourse than to any other discourse.

My second answer to the question of selection is “importance.” Importance is a rather vague quality, and, statistical analyses of how often an article has been cited notwithstanding, bound to be subjective. I have chosen to focus on books and articles that I hold to be important based on what other people write about them, how other people reference them, and the connection between their argument and the debate as a whole.

The last answer to the question of selection is “arbitrariness.” At least to a certain degree, I must acknowledge that the selection of books and articles I have come across is arbitrary. Still, the debate I write about must by definition be the debate comprised by the books and articles I discuss. What is more relevant is the self-referential nature of a group of scholars, and the lock-in effect it may create. I have chosen to focus mainly on academic contributions of Anglo-American scholars, which causes me to have a bias toward peer-reviewed articles and proceedings from academic conferences. Arguably, these scholars also have a bias toward such articles and proceedings. And as one of the main approaches to discover other contributions within a discursive field is to look up the cited works, the self-referential nature of a group of scholars might create a lock-in effect limiting the options of which books and articles to select.

Moreover, most scholars can, at least to a certain extent, be criticised for having an easier time citing scholars who agree than scholars who disagree. I suspect that I will also be liable to such critique. This phenomenon can easily add to the lock-in effect discussed above and further limit the number of books and articles that are available to be selected at all. Uncovering tendencies like this is an important aspect of the intellectual history of a debate.

Also, people tend to write about subjects which are interesting to them. My thesis is no exception from this. As such, of all the participants in a debate, a majority is likely to have a special interest in the topic. This at least seems to be true for debates about subjects like the public domain. People who have no interest in the public domain tend to spend their time doing other things. My choice to write about the intellectual history of the modern debate on the public domain, and not the intellectual history about the debate on the public domain vs. copyright, has left me with only a few articles disapproving of the public domain itself. I could find more if I extended my subject to include copyright to a larger degree than I already do, but I have chosen to focus on the debate on the public do-



main. Rather obvious, but still crucial enough to state clearly, the overwhelming enthusiasm toward the public domain one is met with in studying the intellectual history of the subject is not necessarily representative of the general situation of the 1980s and 1990s. The enthusiasm is representative of the participants in the debate on the public domain.

## Part I

# EMERGENCE

## Discovering the Public Domain

In 1981, Lange wrote: “Recognition of new intellectual property interests should be offset today by equally deliberate recognition of individual rights in the public domain.”<sup>19</sup> Criticising the intellectual property regime was not unusual for an American intellectual property law professor at that time, but Lange arguably did more than just criticise intellectual property law. In fact, Lange claimed that the privatisation of the public domain threatened both our cultural heritage *and* the “rich promise of works to come.” By doing this, he initiated a public domain discourse within the larger discursive field of American intellectual property law.<sup>20</sup>

Nonetheless, his contribution was not profoundly innovative. His article “Recognizing the Public Domain” depended greatly on earlier criticism of intellectual property law. Rather than being the first significant advocate of the public domain, it could just as easily be argued that Lange was nothing more than one of a number of critics of intellectual property — although one that leaned heavily toward the public domain. In fact, a large part of Lange’s article is conceptually similar to earlier articles written by people like William Krasilovsky, Benjamin Kaplan, and Stephen Breyer. As I will discuss later, the contributions belonging to this first phase of the debate were more or less confined to a jurisprudential frame of reference and intellectual property law. The first thing I will analyse in this part is therefore the connection between Lange’s article and some of the previous criticism of intellectual property law.

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<sup>19</sup>David Lange, “Recognizing the Public Domain”, *Law and Contemporary Problems* 44, 1981, p. 147.

<sup>20</sup>See, among others, Jessica Litman, “The Public Domain”, *Emory Law Journal* 39, 1990, Edward Samuels, “The Public Domain in Copyright Law”, *Journal of the Copyright Society* 41, 1993, James Boyle, “The Second Enclosure Movement”, *Law and Contemporary Problems* 66, 2003.

## The Revision Bill Debate

What I have called the *revision bill debate* is the scholarly debate related to the prolonged negotiation about suggested copyright revision bills in USA, which was finally enacted with the 1976 General Copyright Revision. Not having been updated or revised since the Copyright Act of 1909, the argument was that American copyright law was outdated and out of touch with reality. According to Kaplan the 1960s were characterised by a widespread consent that something had to be done to American copyright law:

As a veteran listener at many lectures by copyright specialists over the past decade, I know it is almost obligatory for a speaker to begin by invoking the “communications revolution” of our time, then to pronounce upon the inadequacies of the present copyright act, and finally to encourage all hands to cooperate in getting a Revision Bill passed.<sup>21</sup>

The sad tale of cruel forfeitures (annulment of an author’s copyright due to lack of proper copyright notice) and the desire to join the *Berne Convention for the Protection of Literary and Artistic Works* did certainly not diminish the push for copyright revision, but the dramatic changes in the technological landscape — the communications revolution — was probably a lot more important. Since 1909, inventions ranging from Péter Károly Goldmark’s vinyl phonograph, the Technicolor processes for adding color to movies, computers, the magnetic tape, the compact cassette, the videocassette recorder, valve and transistor radio, as well as the TV, had turned the media world upside down. The fact that Hollywood was nothing but a small village just outside of Los Angeles in 1909 puts things into perspective.

One of the most important innovations in connection with copyright, however, was the invention of the Xerox photocopier in 1959. Calls for copyright revision would certainly have been made even in the absence of the photocopier, but they would not have sparked the same debate. The distinctive feature of the revision bill debate, separating it from all previous debates on copyright, was the way it involved what we might call “consumer” technologies — technologies

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<sup>21</sup>Benjamin Kaplan, “An Unhurried View of Copyright”. In: *An Unhurried View of Copyright, Republished (And With Contributions From Friends)*, ed. by Iris C. Geik and et al., Newark: LexisNexis Matthew Bender, 2005, p. 1.

intended for widespread adoption. The most important of these technologies was the photocopier, even though some of the recording equipment also were intended for private use.

What the photocopier did was to challenge the traditional separation of *idea* and *expression* in copyright law. In the eighteenth and nineteenth centuries it was fairly easy to separate the idea (the content) from the expression (the book) because you had to have a large printing press in order to print a book. It was *hard*, as Lawrence Lessig has argued, to violate intellectual property law.<sup>22</sup> The copier, however, made copyright infringement a commonplace. As early as 1967, Kaplan argued that some of the suggestions for a revision bill would “leave a sizable fraction of the population [...] thus uncertainly subject to civil and even criminal liability for acts now as habitual to them as a shave in the morning.”<sup>23</sup>

Kaplan’s quote illustrates how important the photocopier was to the revision bill debate for two reasons. In the eyes of the proponents of stronger intellectual property rights, copying was *endemic*. The pervasiveness of the photocopier had made it more difficult to keep copyright infringement in check. In the eyes of the opponents of stronger intellectual property rights, on the other hand, copying was *abounding*. The photocopier had introduced new ways to use and perhaps even enjoy different kinds of paper-based information and knowledge. “Scholars, teachers, and librarians of course insist on this copying as essential to their work,” Kaplan wrote, because “[m]achine copying of texts is getting progressively easier and cheaper; and it can be done privately, without attracting much attention to itself.”<sup>24</sup> This analytical dichotomy — in which technology is not assessed based on what it actually does but whether it (1) increases the likelihood of copyright infringement or (2) supplements people’s potential use of information and knowledge — is characteristic for the whole debate on the public domain.

In the following, I am going to look at three distinct arguments presented by copyright critics participating in the revision bill debate, and then compare these to Lange’s 1981 article “Recognizing the Public Domain.” The first argument focuses on utility, and is based on a commonsensial approach. The second argument is based on a simple economic approach, questioning the validity of intellectual property rights. The third is a rights-based approach, discussing the existence of a common right to access information and knowledge.

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<sup>22</sup>Lessig, *Free Culture*, p. 50.

<sup>23</sup>Kaplan, “An Unhurried View of Copyright”, p. 102.

<sup>24</sup>*Ibid.*, p. 101.

## 1. The Commonsensical Approach

The most serious contender for the position Lange's article is presumed to have — i.e. the “article that initiated the modern debate on the public domain” — is William M. Krasilovsky's 1967 article “Observations on Public Domain.” Krasilovsky's main proposal was to establish “an office of Commissioner of Public Domain in Science and the Useful Arts.” The task of this office should be to catalogue available public domain items, and to promote the use of such works.<sup>25</sup> This suggestion is inspired by the practices in the “analogous public domain areas of fish and wildlife, public lands and minerals.” For, Krasilovsky argues, “in each of these areas, appropriate government offices make regular surveys of the public domain, promulgate information concerning its availability and generally encourage orderly and efficient use for public benefit.”<sup>26</sup>

What is clear from this quote is that Krasilovsky views the public domain as something that should be used. To Krasilovsky, however, the expansions of copyright was not a threat to the public domain. In fact, Krasilovsky did not argue explicitly for the protection of the public domain at all. What he did acknowledge, however, was the usefulness of access to old material, a view he shared with Stephen Breyer: “Yet to facilitate the copying of old writings is particularly important, for an old writing that someone wishes to copy is likely to have unique merit or to be needed for research or education.”<sup>27</sup>

Contrary to Krasilovsky, this understanding of the value of that which is freely available prompted Breyer and Kaplan to oppose the proposed copyright extensions. Not, however, because they were convinced it would be bad. To Breyer, it was because it seemed “probable” that the harm an extension caused would be worse than the benefits;<sup>28</sup> to Kaplan, it was because the case *for* extension was not convincing enough. It was strange, argued Kaplan, to argue for an expansion of copyright in a society “in which nearly all else is moving and obsolescing at an accelerating pace, in which businessmen are rarely moved by any but quick-return prospects.”<sup>29</sup>

Despite the fact that they did not argue within the same domain — Krasilovsky argued that the public domain should be available and used, Breyer and Kaplan argued that copyright should be limited — their reasoning shares the quality

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<sup>25</sup>M. William Krasilovsky, “Observations on the Public Domain”, *Bulletin of the Copyright Society of the U.S.A.* 14, 1967, p. 228.

<sup>26</sup>*Ibid.*, p. 225.

<sup>27</sup>Stephen Breyer, “The Uneasy Case for Copyright”, *Harvard Law Review* 84, 1970, p. 326.

<sup>28</sup>*Ibid.*, p. 327.

<sup>29</sup>Kaplan, “An Unhurried View of Copyright”, p. 115.

of being utilitarian. As Krasilovsky wrote, the task of the government offices he suggested was to encourage “orderly and efficient use for public benefit.” The underlying objective is functionality and efficiency, which makes common sense the base of the argument. The argument rests on what the most efficient mechanism for achieving an optimal production of information goods is. Edwin Hettinger later labelled this approach the “Utilitarian Justification,” and claimed that it was similar to the justification for patents and copyrights in the American constitution, viz. “to promote the progress of science and the useful arts.”<sup>30</sup>

## 2. The Economic Approach

Constructing an argument on the rather unspecific and fragile framework of utility was not likely to be of much value in a country increasingly shaped by markets, however, and it should not come as a surprise that Stephen Breyer in his 1970 article “The Uneasy Case for Copyright” concluded that “none of the noneconomic goals served by copyright law seems an adequate justification for a copyright system.”<sup>31</sup> Rather, Breyer argued, intellectual property should be seen as a remuneration the society grants its “authors,” and the optimal length and strength of the protection granted to the creator should be found through a simple comparison of the cost of exclusive ownership and the value of accessibility.

Kaplan’s argument that “scattered works may have commercial value after fifty-six years hardly seems a justification for keeping all works under wraps for another twenty years”<sup>32</sup> illustrates this bias toward the economic reasoning because copyright is so strongly connected to commercial value. To Kaplan, it seems, the protection should roughly correspond to the commercial life of the work. This means that the inherent understanding of the public domain is that it is a miscellaneous collection of commercially worthless works. It is not my argument that Kaplan did not in any way recognise any noneconomic value in the public domain, but that his choice of words indicates that the context in which they were written were rather unfavourable to noneconomic arguments. To make his case, it seems, he had to rest it on an economic foundation.

The same applies to Breyer. His argument that “none of the noneconomic goals served by copyright law seems an adequate justification”<sup>33</sup> cannot be turned

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<sup>30</sup>Edwin Hettinger, “Justifying Intellectual Property”, *Philosophy and Public Affairs* 18, 1989, p. 47.

<sup>31</sup>Breyer, “The Uneasy Case for Copyright”, p. 291.

<sup>32</sup>Kaplan, “An Unhurried View of Copyright”, p. 115.

<sup>33</sup>Breyer, “The Uneasy Case for Copyright”, p. 291.

around to say that “none of the noneconomic goals served by the public domain seems an adequate justification.” So even though he did not explicitly deny that there exists a noneconomic value of a strong public domain, he did not mention it either. Whether Breyer did not think of mentioning any noneconomic goals served by a strong public domain, or just did not bother to include that sort of reasoning because it would not be effective as arguments in the context of the revision bill debate in 1970, is irrelevant. The main point is that Breyer’s argument, especially seen in connection with Kaplan’s, shows how quintessential the economic argument was to the copyright debate of the 1970s. To Breyer, the argument “rest upon the economic inducement to publication that copyright provides.”<sup>34</sup>

Another example of this economic reasoning is the discussion about copyright protection after the author’s death. Perhaps the most obvious noneconomic argument is that the work should be seen as a sort of “family heirloom,” and, therefore, should be controlled by the family. Breyer, however, focuses more on the economic incentive it creates. Will the author really consider how many years after his own death his work receives protection before he decides whether or not to write the book? Breyer: “It is, of course, conceivable that some prospective Miltons have given up writing after learning that Milton’s daughter was destitute, but it is most unlikely.”<sup>35</sup>

### 3. The Rights-Based Approach

Even though it can be said that the economic reasoning dominated the debate, some of the arguments were about privileges. I have called this the “rights-based” approach, because it focuses on the entitlements human beings have in our common culture. This approach is, at least to a certain degree, the inverse of the kind of argument on copyright Breyer described as being “based upon the author’s ‘moral rights’ to reap the fruit of his labors or to control what he has created.”<sup>36</sup> Instead of being the *author’s* rights, then, it is about the *consumers’* rights. The approach is perhaps best described by Kaplan, who wrote: “I reflected that if a man has any ‘natural’ rights, not the least must be a right to imitate his fellows, and thus to reap where he has not sown.”<sup>37</sup>

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<sup>34</sup>Ibid., p. 284.

<sup>35</sup>Ibid., p. 324.

<sup>36</sup>Ibid., p. 284.

<sup>37</sup>Kaplan, “An Unhurried View of Copyright”, p. 2.

Kaplan was not the first to argue about a “right” to use, however. In the landmark 1918 Supreme Court case *Int’l News Serv. v. Associated Press*, Justice Louis Brandeis hinted at a common right to that which is not protected: “[T]he general rule of law is, that the noblest of human production — knowledge, truths ascertained, conceptions, and ideas — become, after voluntary communication to others, free as the air to common use.”<sup>38</sup> Consistent with this line of argument, Brandeis later held that “sharing the goodwill of an article unprotected by patent or trademark is the exercise of a right possessed by all” in the 1938 case *Kellogg Co. v. National Biscuit Co.*<sup>39</sup>

Still, this rights-based approach cannot be said to have been widespread, neither before nor during the revision bill debate, and it was not nearly as important as the commonsensical approach and the economic approach. The reason I have included it as one of the three approaches I have focused on from the revision bill debate is that such arguments were actually presented at the time, the importance of which I am going to get back to below.

## Recognising the Public Domain

By and large, the revision bill debate focused on copyright. The public domain was seldom mentioned, and, with the notable exception of Krasilovsky’s 1967 article “Observations on Public Domain,” it was not the center of attention. Apart from Krasilovsky, Lange’s 1981 article can therefore be said to have been the first to focus primarily on the public domain. A quote from Litman illustrates how unusual this approach was: “Although the public domain is implicit in all commentary on intellectual property, it rarely takes central stage.”<sup>40</sup>

Recognising Krasilovsky’s importance, I will begin with a juxtaposition of Lange’s and Krasilovsky’s understanding of the public domain before I turn to the comparison of Lange’s arguments and the typical arguments in the revision bill debate. Lange’s article is recognised as the beginning of the modern debate on the public domain, but his argument were, seemingly, not all that new.

<sup>38</sup>*International News Service v. Associated Press*, 248 U.S. 215 (1918), p. 250.

<sup>39</sup>*Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111 (1938), p. 122.

<sup>40</sup>Litman, “The Public Domain”, p. 977.



## Positive existence or negative existence

The main difference between Lange and Krasilovsky, at least when it comes to their roles in initiating a public domain discourse, is their understanding of the *kind* of entity the public domain is. Lange did not attempt to write a definition of the public domain, but it is clear from the beginning of the article that the public domain has a positive existence. Krasilovsky, on the other hand, did attempt a definition. To Krasilovsky, the public domain is “the other side of the coin of copyright [...] best defined in negative terms.”<sup>41</sup> By writing this, Krasilovsky made explicit an understanding of the public domain that had been inherent from the beginning. And by “beginning,” I mean the creation of the immaterial public domain as a legal entity in Anglo-American law by the enactment of the Statute of Monopolies in 1623<sup>42</sup> and the Statute of Anne in 1710.<sup>43</sup>

One could argue, namely, that the original introduction of such a “public domain” was done more or less unconsciously as the public domain is actually not mentioned in these statutes at all. As a result of this, one could say that the public domain as a legal entity appeared as a negation of that which was protected. This does not mean, however, that the public domain, or at least the limits of copyright, were never discussed. But the approach was just as negatory as Krasilovsky’s definition (in the sense of being absent, not its derogatory sense). According to Joseph Yates in the 1762 lawsuit *Tonson v. Collins*, for instance, “publication has [...] made the work common to every body; like land thrown into the highway.”<sup>44</sup> Moreover, Sir John Dalrymple followed Yates in the proceedings in the critical 1774 House of Lords case *Donaldson v. Beckett*, and argued that the publication of ideas makes them public: “[W]hen he publishes [ideas] they are his no longer. If I take water from the ocean, it is mine, if I pour it back it is mine no longer.”<sup>45</sup> The copyright clause of the United States constitution followed this negatory tradition wholeheartedly.<sup>46</sup> The clause does not mention the public domain specifically, but still confirms the existence of something which is not protected — and, arguably, free to all — by stating that the exclusive right of authors and inventors is only temporary.

<sup>41</sup>Krasilovsky, “Observations on the Public Domain”, p. 205.

<sup>42</sup>Tyler T. Ochoa, “Origins and Meanings of the Public Domain”, *University of Dayton Law Review* 28, 2003, p. 215.

<sup>43</sup>Stanley W. Lindberg and L. Ray Patterson, *The Nature of Copyright*, (Athens (GA): University of Georgia Press, 1991), p. 30.

<sup>44</sup>Joseph Yates in Mark Rose, *Authors and Owners - The Invention of Copyright*, (London: Harvard University Press, 1993), p. 77.

<sup>45</sup>Sir John Dalrymple in Lindberg and Patterson, *The Nature of Copyright*, p. 39.

<sup>46</sup>*Ibid.*, p. 47.

At this point in time, “that which was not protected” was not even given a name. The term “public domain” was primarily used to refer to land owned by the government throughout the 19th century, but was gradually introduced as a name for these intellectual or cultural “commons” as well. According to Jessica Litman and Tyler Ochoa, the term was exported to English from French through work on the Berne Declaration in the 1880s and 1890s<sup>47</sup>. This claim is backed up by the fact that the first time the United States Supreme Court used “public domain” as a reference to an intellectual commons was in *Singer Manufacturing Co. v. June Manufacturing Co.* in 1896.<sup>48</sup> The term was used in its immaterial sense before this, however, at least sporadically. One example is in a discussion of copyright in European Countries in Harper’s Magazine in 1859: “[I]n Sweden [...] the work falls into the public domain if the heirs neglect to reprint it.”<sup>49</sup>

The general understanding of the public domain, from Krasilovsky all the way back to the Statute of Monopolies and the Statute of Anne, was what I have called negatory. The public domain was, despite being given a name, “that which is not protected,” which is why it was said that artistic and literary works “fall” into the public domain. This public domain “tends to appear amorphous and vague.”<sup>50</sup> It has no boundaries, and is more like an endless and fleeting sea than a solid, tangible piece of land.

Even in the 1966 case *Graham v. John Deere Co.*, which according to James Boyle was remarkable because it went “beyond a mere recitation of the Framers’ attitude toward the dangers posed by monopoly” and made “an affirmative argument for the public domain,”<sup>51</sup> the public domain was not explicitly recognised as a positive entity. Rather, the court simply held that “Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain.”<sup>52</sup> That William Krasilovsky in his 1967 article actually attempted a definition was therefore novel, but the definition was just as negatory as the recognition of the public domain in the Statute of Anne. The novelty of Krasilovsky’s article was that he made the negatory view explicit.

Contrary to this, Lange regarded the public domain as something “positive.” To Lange, the public domain was *not* a vast and limitless “unexplored abstraction.” Rather, public domain *is* something, and extensions in copyright law has consequences because it reduces the public domain. Despite the fact that Lange did

<sup>47</sup>Litman, “The Public Domain”, Ochoa, “Origins and Meanings of the Public Domain”, p. 215.

<sup>48</sup>Ibid.

<sup>49</sup>George William Curtis, “Editor’s easy chair”, *Harper’s New Monthly Magazine*, 1859, p. 275.

<sup>50</sup>Lange, “Recognizing the Public Domain”, p. 177.

<sup>51</sup>Boyle, “The Second Enclosure Movement”, p. 67.

<sup>52</sup>*Graham v. John Deere Co.*, 383 U.S. 1 (1966), 5f.

not attempt to find a definition of “public domain,” Lange’s 1981 article stands out (1) due to the way it puts the public domain center stage (even though Lange shares this approach with Krasilovsky), and (2) due to the way it recognises the public domain as a positive, existing entity. That being said, a number of the arguments put forward in the article are similar to arguments put forward within the context of the revision bill debate.

## Lange and the approaches of the Revision Bill Debate

The first of Lange’s arguments that I am going to compare to the arguments of the revision bill debate is his call for individual entitlements in that which is not protected. After all, it is only a continuation of the arguments belonging to the rights-based approach when Lange argues that “recognition of new intellectual property interests should be offset today by equally deliberate recognition of individual rights in the public domain.”<sup>53</sup> This approach has been developed significantly in a much later article by Lange, but in the 1981 article, “deliberate recognition of individual rights in the public domain” is the full extent of his description of these rights. As such, this aspect of Lange’s article can only be seen as a follow-up to the rights-based approach I described by quoting Kaplan and Justice Brandeis above, and not a very innovative at that.

Moreover, the body of Lange’s article is a discussion of a number of different copyright law cases. This discussion is meant as an illustration of how the growth of intellectual property in the 1970s has been “uncontrolled to the point of recklessness.”<sup>54</sup> One of the cases is *DC Comics, Inc. v. Board of Trustees*, in which a group of students at the Richard J. Daley campus of the City Colleges of Chicago was sued by DC Comics, the owner of Superman, for naming their school paper “The Daily Planet.” To remove any doubt as to the origin of the name, Lange wrote, they also chose a planet to serve as the logo for the paper, as well as the motto “Truth, Justice, and the American Way.” It was clearly not a typo, but why, Lange asked, would anyone but the students care?

To Lange, the field of intellectual property was like “a game of conceptual Pac Man in which everything in sight is being gobbled up.”<sup>55</sup> This is eloquently put, and a lot more polemical and sarcastic than Breyer and Kaplan. But Breyer and Kaplan also criticised the copyright extensions. The difference between Lange and his predecessors on this point is in *degree*, not in *kind*.

<sup>53</sup>Lange, “Recognizing the Public Domain”, p. 147.

<sup>54</sup>*Ibid.*, p. 147.

<sup>55</sup>*Ibid.*, p. 156.

More unprecedented, however, is his view on what is lost without the public domain: “As access to the public domain is choked, or even closed off altogether, the public loses too,” Lange argues. More specifically, the public “loses the rich heritage of its culture, the rich presence of new works derived from that culture, and the rich promise of works to come.”<sup>56</sup>

There are two distinct notions of the value of the public domain in this quote. The first is how the public domain encompass a “rich heritage.” Lange’s choice of words is stronger, broader, and more passionate than Breyer’s, but the essence is just the same as when Breyer argued that “old writing that someone wishes to copy is likely to have unique merit or to be needed for research or education.”<sup>57</sup> The second notion is more novel, however. When Lange wrote that the public loses the “rich promise of works to come,” he indicated that the public domain serves as some sort of “raw material” for new works. This notion is similar to William Carman, who in his 1954 article “The Function of the Judge and the Jury” argued that “they are the raw materials with which creative imaginations must work, and under no circumstances can they in and of themselves become the private property of any individual.”<sup>58</sup> This is remarkably similar to Lange, and contradicts the claim that Lange’s approach was novel. Carman’s article came before the revision bill debate, however, which might indicate that the traditional view of, well, the traditional view of the public domain might be wrong, and that Lange was novel in the sense of bringing back something that had been lost.

There is also a case to be made for seeing this understanding of the public domain as raw material as a continuation of the view inherent in certain Supreme Court cases in the early 1960s, but it is not strong. I have already mentioned *Graham v. John Deere Co.*, where the court held that “Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain.”<sup>59</sup> The argument is certainly reminiscent of Lange’s, but the court is not explicit in its recognition of the public domain as raw material. Rather, the court sees the value of the public domain as deriving from its important role in a competitive economy. It is impossible to copy, and, hence, to compete, if the product is protected by intellectual property law. In this view, copyright and patent must be balanced with the harm to society caused by loss of competition. This argument is easily detectable in Justice Hugo Black’s dissenting opinion in the 1964 case *Aro Mfg. Co. v. Convertible Top Replacement*

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<sup>56</sup>Lange, “Recognizing the Public Domain”, p. 164.

<sup>57</sup>Breyer, “The Uneasy Case for Copyright”, p. 326.

<sup>58</sup>William Carman, “The Function of the Judge and Jury in the “Literary Property” Lawsuit”, *California Law Review* 42, 1954, p. 58.

<sup>59</sup>*Graham v. John Deere Co.* 5f.

Co.. In the opinion, Black held that articles that are not patentable are in the public domain, and granting them any kind of “legally protected monopoly offends the constitutional plan of a competitive economy.”<sup>60</sup> To a certain degree Lange’s “rich promise of works to come” is indeed comparable to the Supreme Court cases of the early 1960s, but Lange’s approach is still sufficiently different to be seen as a novelty.

## Krasilovsky or Lange

As I have mentioned, Krasilovsky’s “Observations on Public Domain” is the most serious contender for the position as the beginning the public domain discourse. But the modern debate on the public domain did not begin in 1967. First, Krasilovsky did not see the public domain as a positive entity. Rather, the “Krasilovskian” public domain was “best defined in negative terms.” Second, Krasilovsky did not contrast and juxtapose the protection of the public domain and the expansion of intellectual property rights. Krasilovsky’s contention was that we needed to improve the use of that which was in the public domain, but he did not single out the underuse of public domain works as a result of too strong intellectual property rights. His proposal was to create a government organization to enhance the common benefit of the public domain, not limit the copyright term. As such, it could be argued that it would not be contradictory to Krasilovsky’s position to solve this underuse by extending intellectual property rights. Lange, on the other hand, argued explicitly against extensions of intellectual property. The point in case is not that a disapproving view of copyright — or at least the expansions of intellectual property rights in the late twentieth century — is a prerequisite for being the “initiator” of the debate. Rather, the essential quality is to make a connection between the public domain and intellectual property. Krasilovsky does not have this connection, and so he does not fit into the tradition of the debate. This brings me to the third point: Krasilovsky’s article is not recognised as the beginning of the debate.

Recognition from within a debate itself it not a sufficient reason to accept that a certain event was actually *the* event that separated two historical periods, but when it fits with the actual situation it is often beneficial to include such a recognition among the reasons for seeing the event as the breaking point. This is the reason for mentioning the fact that Lange’s article is widely recognised as the beginning of the modern debate. It would have been more obvious had

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<sup>60</sup>Justice Hugo Black in Daphne R. Leeds, “Product Simulation: A Right or a Wrong?”, *Columbia Law Review* 64, 1964, p. 1188.

the “Langean” public domain debate not been dormant throughout the whole of the 1980s, but when the subject was brought up again Lange’s article was an important inspiration.<sup>61</sup>

To sum up, it is my opinion that Lange did represent a break with the past (1) because he hinted at a far more tangible recognition of the public domain, (2) because he set the public domain center stage, (3) because he indicated the value of the public domain as raw material for new works, and (4) because he did all of this simultaneously. At the same time, however, a large part of his article belongs to a tradition of copyright criticism deriving from the revision bill debate. As such, it is fair to say that the modern debate on the public domain *originated* in the realm of American copyright law scholars. What Lange did was to *frame* a new public domain discourse by approaching the subject from a different point of view.

To Lange, the public domain was a subject to be studied in its own right, not just “the other side” of something more worthy of study. Nevertheless, the “public domain” remained a subsidiary concept within intellectual property law for quite some time. It stayed, one could perhaps say, within the context in which it was born. This is why Debora Halbert wrote that “the idea of the public domain is woven into the fabric of copyright and patent law.”<sup>62</sup> It was not until the 1990s and early 2000s that the public domain really emerged from the copyright realm and became the “coordinating principle” of a new social theory on free culture and immaterial rights.

## World Wide Neoliberalism

As I showed in the last chapter, Lange’s 1981 article “Recognizing the Public Domain” initiated the modern debate on the public domain by approaching “that which is not protected” in a novel way. I also showed how the debate originated in the realm of American copyright law scholars. My use of Supreme Court cases regarding patent law in the 1960s can therefore be criticised for being beside the point, but they do demonstrate the fact that the public domain was not a

<sup>61</sup>Interview with Jessica Lange transcribed in Bollier, *Viral Spiral*, p. 59.

<sup>62</sup>Halbert, *Resisting Intellectual Property*, p. 16.

concept exclusively belonging to copyright law and that the “public domain” was certainly not “created” as such in 1981. Moreover, it brings attention to the fact that recognition of the value of the public domain had been more apparent in the case of patent law than in the case of copyright law. According to Litman, this had been the case since the first U. S. patent statute. While the patent system has always “incorporated a strong vision of the divide between patentable inventions and technology in the public domain,” Litman writes, “the copyright system, in contrast, has boasted no analogous overarching scheme.”<sup>63</sup>

The question that begs to be asked is why, but the answer seems to be rather obvious. The public domain was brought forward because it helped to explain why excessive expansion of copyright would be a bad thing. During the 1960s and 1970s, it has been said, the copyright term was extended ten times.<sup>64</sup> Contrary to this, however, it has also been argued that nine of these extensions can be seen as preliminary extensions awaiting the final version of the revision bill.<sup>65</sup> Still, Congress did extend the copyright term substantially in 1976, as well as expand copyright in other ways, and there can be little doubt that people like Kaplan, Breyer, and especially Lange actually saw this expansion as excessive.

On top of that, the shift toward liberalisation, privatisation and marketisation was visible even in the 1970s. This trend inspired criticism. Lewis Hyde, for example, wrote “The Gift” as a criticism of commercialisation of art in 1983, and Richard Titmuss wrote his essay on “The Gift Relationship” and blood donation systems as a criticism of the “crude utilitarianism” of capitalism as early as 1970. Looking more closely, however, 1970 was not early at all. After all, Karl Polanyi wrote his treatise on the marketisation of society — “The Great Transformation” — in 1944, not to mention people like Keynes and Marx. Criticism of capitalism has actually been around for as long as capitalism has been around.

That criticism of capitalism has a long tradition does not mean that Lange did nothing new in 1981, however. But it is important to keep in mind that the modern debate on the public domain is a part of this larger debate on capitalism itself. What happened in the 1960s and 1970s was that a long standing arrangement within the domain of knowledge and information was challenged by a shift in copyright law. This explains why the modern debate on the public domain originated in the realm of American copyright law scholars. The same line of reasoning can be applied to explain, *inter alia*, how the developments within patent

<sup>63</sup>Litman, “The Public Domain”, p. 978.

<sup>64</sup>Lessig, *Free Culture*, p. 134.

<sup>65</sup>Scott M. Martin, “The Mythology of the Public Domain”, *Loyola of Los Angeles Law Review* 36, 2002, p. 260.

law in the 1980s and 1990s led the participants of the debate to include the public domain of inventions; as well as how the prominence of internet and open source software in the debate was caused by radical technological changes.

But none of this explains the location. Why did the modern debate on the public domain appear within the realm of American copyright law scholars, and not, for instance, in the realm of political science, anthropology, or even economics? According to David Bollier, the reason can be found in the fact that “law schools became more like graduate schools and less like professional schools by the 1980s,” and, hence, that “copyright commentary began to get more scholarly and independent of the industries it studied.”<sup>66</sup> In my view, however, the question is not that important. As I will show in this thesis, parallel analyses were put forward in a number of other disciplines. The reason I have argued that the modern debate originated in copyright law is (1) that copyright scholars were the first to use the term “public domain” consistently, and (2) that this is the context later participants recognise as the origin of the debate. This argument is similar to the argument that Lange’s article was the beginning of the debate because it is widely recognised as such.

Before I turn to the next phase of the modern debate on the public domain in Part II, I am going to take a closer look at three aspects of the contemporary situation of the 1980s and 1990s: (1) The impact of the neoliberal ideology, (2) the development of internet as a low-cost, global communication infrastructure, and (3) globalisation, or “World Wide Neoliberalism.”

## 1. Neoliberalism

The political situation of the 1980s and 1990s was strongly influenced by the victory of Margaret Thatcher’s Tories in the English Parliamentary election in 1979 and the election of Ronald Reagan in the American Presidential Election in November 1980. The neoliberal ideology of the decade has thus been called *Thatcherism* and *Reagonomics*, with a focus on the freedom of the marketplace, privatisation, a smaller and more efficient government, and tax reduction. This trend continued and even strengthened toward the 1990s, when it was globalised, among other things, through the end of the cold war (which has been seen as the triumph of capitalism over communism) and the structural adjustment programmes of the International Monetary Fund. This is what John

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<sup>66</sup>Bollier, *Viral Spiral*, p. 55.



Williamson labelled the “Washington Consensus” in 1989, which I earlier used as an example of an exposition.

The main characteristic of this trend has been the shift toward the marketplace. Examples include government functions, education, and the military. As I mentioned above, this trend was not new in 1980, but it can be argued that the drive toward marketisation increased in strength. This marketisation and privatisation changed the dynamic of society.

It often seems as if the fundamental tenet of this period was “private good, public bad.” This understanding of the period is at least widespread within the modern debate on the public domain. Lewis Hyde illustrates this tenet through an anecdote of an Englishman who is given a beautiful pipe as a peace offering upon his visit to an Indian tribe. The Englishman does not realise that this pipe is a part of a gift circle, and that he is expected to give it away again when someone visits him. As a result, he “takes [the pipe] home and sets it on the mantelpiece.”<sup>67</sup> By doing this, he takes the pipe out of circulation, and destroys the gift exchange. To the Englishman, the pipe only has value as property in his sense of the word. Another example of marketisation is the biotechnology company Monsanto, that sells genetically modified “terminator seeds.” Terminator seeds are seeds that can only be sowed once. Selling terminator seeds is the opposite of traditional, noncommercial seed exchange between local farmers. In addition, the “terminator gene” — the terminational feature of these seeds — makes it impossible to reuse the seed, and renders the traditional, noncommercial seed exchange pointless.

## 2. The World Wide Web

The decades directly preceding the 1980s and 1990s were swamped with technological innovation, ranging from the Xerox photocopier, via the introduction of TV into private homes to home video recording. The quote from Kaplan’s 1968 lecture “An Unhurried View of Copyright” I used above shows that it was commonplace already then to talk about “the ‘communications revolution’ of our time.”<sup>68</sup> But this revolution did not end with home video recording. Rather, the period from 1960 to 2000 has seen continual innovation in communications technology.

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<sup>67</sup>Lewis Hyde, *The Gift*, (Edinburgh: Canongate, 2006), p. 3.

<sup>68</sup>Kaplan, “An Unhurried View of Copyright”, p. 1.

A short list of some of the most important technological changes during the 1980s and 1990s must at least include the “mutation” of the narrow and exclusive precursor to the internet — ARPANET — into the internet, the combination of hyperlinked documents and this new internet into what Tim Berners-Lee called the World Wide Web, and the cost reductions and ensuing spread of both personal computers and cell phones during the 1990s and especially the early 2000s — as well as the dramatic rise in wireless networking it has sparked.

Strictly speaking, the internet is just the servers and the cables between them, while the World Wide Web is the hyperlinked documents. The two terms are often conflated in popular use, and when I write about internet I mean internet in a rather broad sense as a combination of all of these technological changes. The development of internet — in this “broad sense” — can be divided into three main stages. The first stage was the pre-WWW stage of ARPANET and the development of new, open communication protocols. The second stage was the growth of the World Wide Web and its hyperlinked pages. These web pages have been described as rather static, however. Not because they were static in any way reminiscent of how printed media are static, but because they were static compared to the dynamic pages of the third stage, which has been dubbed “Web 2.0.” Web 2.0, or “participatory internet,” was characterised by dynamic and collaborative web sites like Wikipedia, Slashdot, YouTube, Facebook, and MySpace.

While the main character of the second stage is different in *kind* to the first stage, the main character of the third stage is only different in *degree* to the second stage. The internet of the 1990s was not really filled with “static” pages, at least not in a strict sense of the word. On the contrary, even the second phase was revolutionary in that it allowed a dramatically increased number of people to publish information that could easily be changed or updated. When I write “easily” I mean easily in the eyes of the contemporary observer, who would have to compare it to publishing through a photocopier or a printing press. The fact that updating web pages became even easier in the 2000s does not change this argument. Also, the amount and length of textual information was virtually limitless in both phases. With the introduction of participatory web sites like Flickr and YouTube in the third stage one could perhaps argue that the amount of pictures and videos, respectively, are also bordering on virtual limitlessness. This is obviously a radical change from the second to the third stage. In my view, however, an increase in storage capacity does not invalidate the argument that the change between the second and third stage was a gradual one.

### 3. Globalisation

Joseph Stiglitz defines globalisation as “the removal of barriers to free trade and the closer integration of national economies.”<sup>69</sup> This definition is strictly economic, and largely excludes both cultural aspects of globalisation and the construction of a global — or at least a more global — identity due to increased interaction across national borders. Also, globalisation, at least the way I am going to use the term, encompasses an increase in the body of international law. A number of international treaties have been negotiated and ratified during the 1980s and 1990s, among others the Convention of the Law of the Sea, the Kyoto Protocol and the Rome Statute of the International Criminal Court. In the context of intellectual property rights, both the 1991 revision of the Convention for the Protection of New Varieties of Plants and the American implementation of the Berne Convention in 1988 are relevant examples, but the most important is probably the 1995 TRIPS agreement of the World Trade Organisation. The TRIPS Agreement was negotiated between 1986 and 1994, and came into effect January 1, 1995. Through this agreement, strong, western-style patent and copyright law was expanded to almost all countries. John Perry Barlow criticised this agreement in 1994 because it involved making “adherence to our moribund systems of intellectual property protection a condition of membership in the marketplace of nations.”<sup>70</sup> In this period, then, we have, at least to a certain degree, seen a shift of jurisdiction from a national level to an international level.

In addition to marketisation and technological transformation, then, the general trend of the 1980s and 1990s that influenced the modern debate on the public domain the most was globalisation. The reason I have described globalisation as a sort of “World Wide Neoliberalism,” however, is that in addition to *being* globalisation, marketisation and technological change further fostered and strengthened it. In a word, they have both strengthened globalisation and been strengthened by globalisation. Easier and more affordable communication, as well as an increase in the scope of communication technology, have made communication across national borders easier and more straightforward. If it is true that we increasingly see ourselves as members of a global community, the technological innovations of the 1980s and 1990s have been an integral part of this.

<sup>69</sup>Joseph Stiglitz, *Globalization and its discontents*, (London: Penguin Books, 2002), p. ix.

<sup>70</sup>John Perry Barlow, “The Economy of Ideas”, *WIRED*, 1994. <http://www.wired.com/wired/archive/2.03/economy.ideas.pr.html> (May 11, 2009).

## Part II

# DECONSTRUCTION

## Criticising the Notions of Intellectual Property

My argument has been that David Lange's 1981 article "Recognizing the Public Domain" should be seen as the beginning of the modern debate on the public domain due to his explicit focus on the public domain as a positive entity; and, moreover, that this "emergence" of the public domain discourse constitutes the first phase of the debate. It is fairly obvious, however, that the debate was in no way a fiery and fervent discussion that instantly burst out and flooded the scientific journals or the newspapers columns. The next proper contribution to the debate on the public domain was arguably not submitted until nine years later. Not that the nine years passed by in complete silence, but few focused solely on the public domain until Jessica Litman published "The Public Domain" in 1990. Litman herself has said that when she discovered Lange's article in the late 1980s, "it had been neither cited nor excerpted nor reprinted nor anything—because nobody was looking for a defense of the public domain."<sup>71</sup>

In the decade of Reaganomics and Thatcherism that might appear to be correct, but it is not entirely true. The neoliberal ideology was influential, but not completely dominant. Both Grossman and Stiglitz' 1980 article "On the Impossibility of Informationally Efficient Markets," Lewis Hyde's 1983 "The Gift," and Edwin Hettinger's 1989 "Justifying Intellectual Property," to mention but a few, can be seen as criticism of the marketisation of the realm of knowledge and information. Having said that, Litman's assertion seems to be more accurate if it is limited to law, and especially copyright law. Moreover, neither Grossman and Stiglitz, Hyde nor Hettinger argues explicitly about a "public domain." And when Carol Rose wrote "The Comedy of the Commons" as a reply to Garrett Hardin's "Tragedy of the Commons" in 1986, she wrote about land, not knowledge and information. Litman's assertion is therefore correct in the sense that nobody looked for a defense of the *Langean* public domain I described in Part I.

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<sup>71</sup>Interview with Jessica Litman transcribed in Bollier, *Viral Spiral*, p. 59.

As a result of this, I view Litman's 1990 article "The Public Domain" as the first main paper *within* copyright law to approach the public domain in the same direct manner as Lange did. On the whole, however, it was Hettinger's 1989 article "Justifying Intellectual Property" that was the first main paper of the second phase, which means that the debate was no longer confined to copyright law. Besides incorporating inventions protected by patents and information protected by trade secrets into the argument, he was a professor of philosophy. Hettinger only used the term "public domain" once, however, and did not associate himself with Lange. In my view, this does not diminish the relevance of the article. Hettinger clearly writes about the same subject matter as the other participants in the modern debate on the public domain, despite the fact that he does not really use the term "public domain." Besides, none of the participants in the debate acknowledged that they were actually participants in the debate at the time. Thus, a lack of references to the debate — which at the time only meant Lange — does not void Hettinger's contribution. Moreover, his inspiration came, as he wrote, both from the "vastly improved information-handling technologies" and from the "larger role information is playing in our society."<sup>72</sup> This inspiration is similar to the inspiration of other participants in the debate. In addition to this, the arguments he presented have become some of the core arguments within the later social theory on free culture.

The most important characteristic of this second phase of the debate, however, is deconstruction. At this point in time, there existed no clear definition of the public domain, and the obligatory component of any treatment of the subject was a critical analysis of intellectual property. In the following, I am therefore going to describe two of these deconstructive attempts in detail. The first is Hettinger's criticism of the "labour justification of property," the second Jessica Litman's analysis of the "romantic notion of authorship." In the last chapter of Part II, I turn to James Boyle's theory on instruments that facilitates deconstruction, and a discussion of the applicability of these instruments. Writing in 1992, Boyle was as much a part of the second phase of the debate as Hettinger and Litman were, but in addition to his analysis of information issues, he considered the theoretical aspects of deconstruction itself. I will therefore consider Boyle's theoretical analysis in light of some of the deconstructive attempts of this phase.

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<sup>72</sup>Hettinger, "Justifying Intellectual Property", p. 32.

## The Labour Justification of Property

“Perhaps the most powerful intuition supporting intellectual property rights,” Hettinger wrote in 1989, is that “people are entitled to the fruits of their labor.”<sup>73</sup> This is often called the author’s “natural right” or “moral right.” In light of the fact that Hettinger focuses almost exclusively on these natural rights, however, it is interesting to note they were so easily dismissed by Breyer in 1970. As I showed in Part I, Breyer’s argument was that “none of the noneconomic goals served by copyright law seems an adequate justification for a copyright system.”<sup>74</sup> This can, of course, be ascribed to some peculiarity in Breyer. That he had a predisposition toward economic reasoning, for example. After all, the natural right approach was not new in the 1980s.<sup>75</sup>

Another possible interpretation is that Breyer’s dismissal was representative of the revision bill debate, and that the natural rights reasoning had an upswing in the late 1970s and 1980s. This might seem strange, given that marketisation and commodification dominated the American public debate. Neoliberalism was not only about marketisation, however, it was just as much about “individualisation.” One should be one’s own man. It is not likely that Margaret Thatcher ever actually said that “a man who, beyond the age of 26, finds himself on a bus can count himself as a failure.” It is an apocryphal quote, but it illustrates the ethos of the age brilliantly. Consequently, a natural right to one’s intellectual creation is not as antithetical to neoliberalism as it would have been if marketisation was the only matter. What seems to be clear, at least, is that Hettinger saw the natural rights reasoning as sufficiently widespread by the late 1980s to focus almost exclusively on the subject.

Hettinger began his argument with an exposition of Locke’s labour theory of property. According to Peter Drahos, Locke on property “has a totemic status.”<sup>76</sup> Despite the fact that Locke did not write directly about intellectual property, then, it is not surprising that Locke’s theory is often the starting point of a discussion on the justification of intellectual property. There are, however, differing opinions

<sup>73</sup>Hettinger, “Justifying Intellectual Property”, p. 36.

<sup>74</sup>Breyer, “The Uneasy Case for Copyright”, p. 291.

<sup>75</sup>See, e.g., William Strauss, “The Moral Right of the Author”, *The American Journal of Comparative Law*, 1955.

<sup>76</sup>Peter Drahos, *A Philosophy of Intellectual Property*, (Sydney: Dartmouth, 1996), p. 41.

on how to interpret his theory even on subjects Locke actually wrote about. Thus, it is certainly not a surprise that the lack of definite lockean language on patents and copyright has caused the opinions on how to extend his theory to the field of intellectual property to be even more disparate.

In short, Locke's theory is based on two premises: First, the earth and all inferior creatures are "common to all men." Second, every man has a property in his own person — "the labour of his body, and the work of his hands [...] are properly his." From this, Locke builds his famous argument: "Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property."<sup>77</sup> Locke then adds two conditions for appropriating what one has "mixed one's labour with." First, any appropriation must leave "enough, and as good" for others. Second, what one appropriates should not go to waste. Locke: "Nothing was made by God for man to spoil or destroy."<sup>78</sup>

Seana Shiffrin argues that intellectual property, at least at first, seems "particularly well suited to the application of Locke's theory."<sup>79</sup> First, there seems to be no raw material involved at all. While printing a book involves cutting down a tree in order to make paper, writing a book does not involve the removal of anything from others. Due to the nonrival nature of knowledge and information, the words used are still available for others to use in other books. Labour is therefore the only factor in the production process, which makes it even easier to justify appropriation. This also means that there will always be "enough, and as good" left for others. Moreover, knowledge and information does not rot, and will therefore never go to waste.

This analysis starts with an understanding of the initial public domain as empty. In this view, "intellectual products are completely the inventions of their authors," and the "creation of intellectual products does not involve any use of common resources."<sup>80</sup> Here, attribution is completely at the side of the author. The author is a *creator*. Contrary to this, however, the author can also be seen as a mere discoverer that finds and brings products out of the public domain, but does not create, develop or refine them. Here, attribution is completely at the side of the public domain. The author is a *discoverer*. In the middle of these rather extreme

<sup>77</sup> John Locke, *Two Treatises of Government*, (Cambridge (MA): Hackett Publishing Company, 1698), p. 288.

<sup>78</sup> *Ibid.*, p. 290.

<sup>79</sup> Seana Shiffrin, "Lockean Arguments for Private Intellectual Property". In: *New Essays in the Legal and Political Theory of Property*, ed. by Stephen R. Munzer, Cambridge: Cambridge University Press, 2001, p. 139.

<sup>80</sup> *Ibid.*, p. 159.

views, “only the subject matter and materials of intellectual products [...] facts, concepts, ideas, propositions, literary themes, musical themes, and values [are] in the commons.”<sup>81</sup> Here, attribution is somewhere between the author and the public domain. The author is a *developer*.

It is only based on an understanding of the author as such a *creator* that my suggested application of Locke’s theory on intellectual property is reasonable. If the author is seen as a *developer* or a *discoverer* the use of Locke’s theory requires a more thorough argument. To Hettinger, the author is neither seen as a developer nor as a discoverer, however. In fact, Hettinger’s view does not seem to fit into Shiffrin’s threeway categorisation at all. To Hettinger, the author is more of a *participant*:

Invention, writing, and thought in general do not operate in a vacuum; intellectual activity is not creation *ex nihilo*. Given this vital dependence of a person’s thoughts on the ideas of those who came before her, intellectual products are fundamentally social products.<sup>82</sup>

Strictly speaking, the view of the author as a *discoverer* and as a *participant* are similar, but viewing the author as a *participant* seems to put greater emphasis on the collaborative aspect. To Hettinger, facts, concepts, ideas, propositions, literary themes, musical themes, etc. does not constitute a divinely bestowed treasury or a reservoir authors travel to in order to collect the raw material needed for their books. Rather, facts, concepts, ideas, etc. are created continually. In this view, “all modern things, like cars and such,” have not always existed, “waiting in a mountain,” like the Icelandic singer Björk considers in her song “The Modern Things.” But even if all the “raw material” is the result of human labour, Hettinger argues, the value “is not entirely attributable to any particular laborer.”<sup>83</sup>

Hettinger began his argument by paraphrasing Robert Nozick’s critique of Locke’s premises. In his 1974 book “Anarchy, State, and Utopia,” Nozick asked why mixing something one owns with something one does not own should result in gaining the thing one did not own rather than losing the thing one did own. More specifically, “if I own a can of tomato juice and spill it in the sea [...], do I thereby come to own the sea, or have I foolishly dissipated my tomato juice?”<sup>84</sup> To Hettinger, this raises the question of what the entitlement of labour should be. Given that the author is seen as a *discoverer*, *developer*, or *participant*, and not a *creator*, value consists of two components: First, the value “attributable to the

<sup>81</sup>Shiffrin, “Lockean Arguments for Private Intellectual Property”, p. 159.

<sup>82</sup>Hettinger, “Justifying Intellectual Property”, p. 38.

<sup>83</sup>Ibid., p. 38.

<sup>84</sup>Robert Nozick, *Anarchy, State, and Utopia*, (Oxford: Basil Blackwell, 1974), p. 175.



object labored on;” and, second, the value “attributable to the labor.”<sup>85</sup> Labour justifies a property right in the value of the labour, argued Hettinger, not “the *total* value of the resulting product.”<sup>86</sup> The mistake, Hettinger wrote, “is to conflate the created object which makes a person deserving of a reward with what the reward should be.”<sup>87</sup> Hettinger eloquently compared this to the lifting of a car:

A person who relies on human intellectual history and makes a small modification to produce something of great value should no more receive what the market will bear than should the last person needed to lift a car receive full credit for lifting it.<sup>88</sup>

Based on this analysis, Hettinger claimed that the notion of the author’s “natural right” is a myth. Information and knowledge are “socially created.” Because of this, Hettinger argued, in what way individual labourers are compensated for their work is “a question of social policy.”<sup>89</sup> This does not mean, however, that Hettinger does not recognise any natural rights at all. But the author’s and the inventor’s natural right is the right to use what they have created. Hettinger:

The natural right of an author to personally use her writings is distinct from the right, protected by copyright, to make her work public, sell it in a market, and then prevent others from making copies. An inventor’s natural right to use the invention for her own benefit is not the same as the right, protected by patent, to sell this invention in a market and exclude others (including independent inventor) from using it.<sup>90</sup>

Turning my original suggestion for a lockean justification of intellectual property more or less on its head, Hettinger thus argued that the only property right Locke’s theory would legitimise was the right to personal use of what one has created. In Hettinger’s view, the only justification for intellectual property is a “utilitarian argument based on providing incentives.”<sup>91</sup>

As mentioned, Hettinger only used the term “public domain” once. Still, phrases like “human intellectual history,” “this socially created phenomenon,” and “the historical/social component” does refer to some sort of “public domain.” Even though Hettinger did not write explicitly about the public domain, his article can be interpreted as a public domain-based criticism of intellectual property. To

<sup>85</sup>Hettinger, “Justifying Intellectual Property”, p. 37.

<sup>86</sup>Ibid., p. 37.

<sup>87</sup>Ibid., p. 41.

<sup>88</sup>Ibid., p. 38.

<sup>89</sup>Ibid., p. 39.

<sup>90</sup>Ibid., p. 40.

<sup>91</sup>Ibid., p. 47.

Hettinger, copyright and patent law cannot be justified through a reinterpretation of Locke. Rather, intellectual property can only be justified as a socially constructed property right based on utility. Even though Hettinger did not write explicitly about the public domain, however, there can be little doubt that his call for a reconstruction of intellectual property builds on a recognition of the value of “the historical/social component” of intellectual creation — the public domain — and how this component is “socially created.”

## The Romantic Notion of Authorship

In her 1990 article “The Public Domain,” Jessica Litman came to a similar conclusion as Hettinger, despite the fact that their approach and their frames of reference were different. While Hettinger focused equally on patents, copyright and trade secrets, Litman focused almost exclusively on copyright. Moreover, Litman argued within the context of copyright law, while Hettinger argued within a philosophical and political sphere. What they had in common was their view on “that which is not protected.”

In addition to this, however, they shared a negatory approach toward the subject matter. Rather than to argue positively about what the public domain is, they argued negatively. Their argument is, in fact, a deconstruction of some of the notions they saw as a threat to the public domain. In this view, Hettinger’s argument was that the labour justification of property was not as convincing as it seemed, because it was oblivious to the participatory nature of intellectual creation. Likewise, Litman’s argument was that what she calls “the romantic notion of authorship” had distorted our understanding of the appropriateness and necessity of intellectual property. It is this analysis I turn to now.

According to Foucault, not all authors are alike. Rather, some authors create more than just “their own works.” Foucault’s examples are Ann Radcliffe, who authored both books and the Gothic horror genre, and Freud and Marx, who created new discourses as well as *The Interpretation of Dreams* and *Das Kapital*. As a result of this, later authors necessarily build upon the work of earlier authors. For example, all authors writing within the Gothic horror genre make use of something from Ann Radcliffe, while all authors writing psychoanalytical

books build on something from Freud. Authors within the marxian discourse are even using Marx' name. To Foucault, authors like Radcliffe, Freud, and Marx "have produced something else: the possibilities and the rules for the formation of other texts."<sup>92</sup> They are what Foucault labelled the "founders of discursivity."

To use the modern debate on the public domain as an example of this, we could perhaps say that Lange was a "founder of discursivity" just as much as Radcliffe, Freud, and Marx. At least to a certain degree, Lange can be recognised as the "founder" of the debate. As I have shown, however, Lange's contribution in his 1981 article "Recognizing the Public Domain" was rather small. A large part of his argument was derived from other people.

The reason this article is recognised as the beginning, then, is because its contribution finally elevated the subject to a proper debate. As a result of this, it is fairly obvious that crediting Lange's article is a simplification. This simplification is necessary, however, as a tool to limit the "cancerous and dangerous [...] proliferation of significations." To Foucault, the author "is the principle of thrift in the proliferation of meaning."<sup>93</sup> Faced with a frightening number of possible interpretations, we turn to the author's intention as a way to fix meaning.<sup>94</sup>

Even though my example has been the "author" of a debate, this notion of authorship — as the principle of thrift in the proliferation of meaning — is also used in general. In addition to being an acknowledgement of authorship through naming, Foucault would say that the author-notion is an instrument used to organise meaning. In the context of the modern debate on the public domain, this analysis is at the base of Litman's "romantic model of authorship." Appropriately enough, given the subject, Litman did not create this analysis from scratch. Rather, she built upon earlier work, especially a 1984 article by Martha Woodmansee, and an early 1988 article by Boyle.

In her 1984 article "The Genius and the Copyright" Woodmansee argued that "author" in its modern sense is a relatively recent invention. It was given its new meaning by a group of German writers who wanted to make a living writing for a new and rapidly expanding reading public in the eighteenth century. Woodmansee examined the relationship between this concept of authorship and copyright, but did not argue explicitly either for or against it. Rather, she explained how copyright could not have been what it is if it was not for the notion of the

<sup>92</sup>Michel Foucault, "What Is An Author?" In: *The Foucault Reader*, ed. by Paul Rabinow, London: Penguin Books, 1991, pp. 101–120, p. 114.

<sup>93</sup>Ibid., p. 118.

<sup>94</sup>James Boyle, "The Search for an Author: Shakespeare and the Framers", *American University Law Review* 37, 1988. <http://www.law.duke.edu/boylesite/Shakesp.htm> (May 11, 2009).

author as “an individual who is solely responsible—and therefore exclusively deserving of credit—for the production of a unique work.”<sup>95</sup>

In his 1988 article on Shakespeare, Boyle picked up Woodmansee’s thread, and argued that the specific understanding of authorship she described was a “romantic notion of authorship.” To Boyle, it is this conception that has caused the controversies over who Shakespeare really was. We project this conception back through history, Boyle wrote, as if it was universal. Then we find fault with the Bard of Avon as he has been presented to us through the centuries, and ask ourselves whether the plays were perhaps written by someone else, someone that fits with our understanding of him as the greatest author of all better than the man born in Stratford.<sup>96</sup>

This critique of a “romantic notion of authorship,” which Litman calls a “romantic model,” lies at the heart of Litman’s article. To Litman, this inspiration is exactly what authorship is about. In Litman’s view, authors do not create something from nothing. Rather, the essence of authorship is “translation and recombination”<sup>97</sup> In the beginning of her article, Litman fittingly quotes Spider Robinson’s award winning short story “Melancholy Elephants”: “Artists have been deluding themselves, for centuries, with the notion that they create. In fact they do nothing of the sort.”<sup>98</sup>

But, even though we can see some of Foucault’s, Woodmansee’s, and Boyle’s arguments in Litman’s article, the arguments have been rearranged, reshaped and rephrased to fit the debate on the public domain. Litman:

Composers recombine sounds they have heard before; playwrights base their characters on bits and pieces drawn from real human beings and other playwrights’ characters; novelists draw their plots from lives and other plots within their experience; software writers use the logic they find in other software; lawyers transform old arguments to fit new facts; cinematographers, actors, choreographers, architects, and sculptors all engage in the process of adapting, transforming, and recombining what is already “out there” in some other form. This is not parasitism: it is the essence of authorship.<sup>99</sup>

Litman’s argument can thus be summarised as follows: Authors do not only reuse that which has already been created by others. Rather, this form of reuse

<sup>95</sup>Woodmansee, “The Genius and the Copyright”, p. 426.

<sup>96</sup>Boyle, “The Search for an Author: Shakespeare and the Framers”.

<sup>97</sup>Litman, “The Public Domain”, p. 966.

<sup>98</sup>Spider Robinson, “Melancholy Elephants”, 1983. <http://www.spiderrobinson.com/melancholyelephants.html> (May 11, 2009).

<sup>99</sup>Litman, “The Public Domain”, 966f.

is more or less tantamount to authorship itself. Thus, in the absence of a vigorous public domain, a large part of authoring as we know it would be illegal.<sup>100</sup> The necessary conclusion to this is that the public domain is indispensable as “raw material available for other authors to use.”<sup>101</sup>

Having finished my discussion on Hettinger’s “labour justification of property” and Litman’s “romantic notion of authorship,” I now turn to Boyle’s theoretical analysis of deconstruction notions like these. It is clearly beyond the scope of this thesis to place Boyle’s theoretical approach in a historical context, and I will content myself with a description of his theory in itself as it illustrates at what stage the introspective analyses of the modern debate on the public domain were at in the second phase of the debate.

## The Treachery of Images

In 1992, James Boyle wrote that “[i]t is hard, nowadays, to find a piece of futurology that *doesn’t* say we are entering an information age.”<sup>102</sup> Still, little research had been done on the information society at that time. According to Boyle, the tools needed to “uncover that which is suppressed or rendered invisible by the overwhelming familiarity of our social arrangements”<sup>103</sup> did not exist in the context of information, at least not in any significant way like they did, e.g., in the context of the modern state, democratic traditions, or the division between capital and labour. Accordingly, tools, in this context, is intellectual instruments increasing our understanding of a subject.

To make his case, Boyle drew upon Felix Cohen and argued that definitions are not useful or useless in themselves. Rather, a definition is “useful if it insures against risks of confusion more serious than any that the definition itself contains.”<sup>104</sup> As such, definitions are similar to abstractions and generalisations because they, too, are language-based tools we employ to make sense of the

<sup>100</sup>Ibid., p. 967.

<sup>101</sup>Ibid., p. 1023.

<sup>102</sup>James Boyle, “A Theory of Law and Information, Copyright, Spleens, Blackmail, and Insider Trading”, *California Law Review* 80, 1992, p. 1416.

<sup>103</sup>Ibid., p. 1423.

<sup>104</sup>Felix S. Cohen in *ibid.*, p. 1424.

world. It is all a process of “naming.” As part of an analysis of a folk tale about a shoemaker and two elves, which I am going to describe in more detail in Part III, Lewis Hyde wrote: “To put clothes on a thing is a kind of acknowledgment, like giving it a name. By this act we begin to differentiate what was undifferentiated.”<sup>105</sup> Calling an author an *author* is the first act of naming. This naming is certainly an acknowledgement of the author. But something similar happens when the label “author” is used to indicate a romantic notion, as in the case of Litman’s “romantic model of authorship.” This attempt to criticise and deconstruct is also an acknowledgement, “like giving it a name.”

Based on this understanding of definitions Boyle maintains (1) that “every dispute about property rights in information resolves itself into a dispute about whether the issue ‘is’ in the public or the private realm.”<sup>106</sup> If this was true, argues Boyle, it would be like looking at a map. Every dispute would be “a factual inquiry about the location of a preexisting entity within a well-charted and settled terrain.”<sup>107</sup> To Boyle, however, the landscape the map is supposed to represent is a socially constructed and continually adapting scene which “folds back onto itself like a Möbius strip.”<sup>108</sup> Moreover, Boyle argues (2) that contemporary economic analyses suppress the contradictions caused by the duality of information by “relying unconsciously on the notion of the romantic author.”<sup>109</sup>

To Boyle, both the notion of the romantic author and the existence of such a map, which Boyle argues would have to be drawn by Dali, Magritte, or Escher, are illusions. As such, they are useless, and perhaps even dangerous. There are no “intelligible geography of public and private,” writes Boyle, and trying to solve these problems by drawing lines is “an empty exchange of stereotypes.” Here, Boyle quotes Nietzsche, and writes that these empty exchanges of stereotypes are “illusions about which one has forgotten that this is what they are; metaphors which are worn out and without sensuous power; coins which have lost their pictures and now matter only as metal, no longer as coins.”<sup>110</sup>

It is not my argument that Boyle was the first within the modern debate on the public domain to notice this “Treachery of Images.”<sup>111</sup> Rather, Boyle was the first to include an introspective methodology in an article on the public domain.

<sup>105</sup>Hyde, *The Gift*, p. 51.

<sup>106</sup>Boyle, “A Theory of Law and Information”, p. 1435.

<sup>107</sup>Ibid., p. 1435.

<sup>108</sup>Ibid., p. 1436.

<sup>109</sup>Ibid., p. 1453.

<sup>110</sup>Friedrich Nietzsche in *ibid.*, p. 1436.

<sup>111</sup>“The Treachery of Images” is a series of paintings by Rene Magritte, the most famous being the one which is not a pipe (“Ceci n’est pas une pipe”).

In some ways, Lange, Hettinger, Litman, and Boyle illustrates the development of a self-consciousness with regard to the methodology one uses in research. First, Lange simply wrote about the public domain. Then Hettinger and Litman started to analyse and deconstruct notions related to the subject, before Boyle discussed the methodology of deconstruction itself. Hence, to the degree that self-consciousness is a part of the development of a field of study, Boyle's discussion of the instruments that facilitates deconstruction signifies that the study of the public domain had reached a new level.

This means that even though creating these "tools" might seem to belong to the reconstructive phase of the debate, it does actually belong to the deconstructive phase of the debate — an instrument that facilitates deconstruction is just as much a "tool" as an instrument that is "constructive." What I mean by this is that even though *creating* a tool is, by definition, a "constructive" act, a tool that makes it easier to expose wrongful or incoherent systems of thought is nevertheless an instrument that facilitates deconstruction. Boyle, for instance, focuses exclusively on tools that facilitates deconstruction.

Neither Boyle nor any of the other participants in the modern debate on the public domain specifies how they use the terms "conception," "notion," and "illusion," even though the tools with which they attempt to deconstruct the wrongful and misleading conceptions related to information issues and the public domain are, in fact, conceptions, notions and illusions. This is not necessarily a bad thing, as it is usually quite easy to see whether they view something as useful or useless. In the following, however, I am for the most part going to use "notion" about conceptions which are seen as useful, "illusion" about conceptions which are seen as useless or even corrupting, and "conceptions" about culturally, politically, economically, and socially created categories and ideas. In a way, conceptions are the bricks of discourses.

In the rest of this chapter, I am going to discuss Boyle's theory on the "Treachery of Images" in light of specific notions and illusions of intellectual property that were deconstructed in the second phase of the modern debate on the public domain — especially authorship and natural rights.

According to Boyle, it is the "overwhelming familiarity of our social arrangements" that causes the uncovering of these illusions to be so hard<sup>112</sup> In accordance with this, Peter Jaszi claimed that copyright scholars focuses more on technical issues of right and wrong as presented by judicial opinions than on analysing and

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<sup>112</sup>Boyle, "A Theory of Law and Information", p. 1423.

deconstructing copyright narratives in his 1991 article on “The Metamorphoses of ‘Authorship’”:

Legal scholars’ failure to theorize copyright relates to their tendency to mythologize “authorship,” leading them to fail (or refuse) to recognize the foundational concept for what it is—a culturally, politically, economically, and socially constructed category rather than a real or natural one.<sup>113</sup>

In her 1991 article “Copyright as Myth,” Litman mostly used the same reasoning to explain the widespread public support of copyright. But contrary to Jaszi, Litman did not only point to the romantic notion of authorship. Rather, Litman attributed much of the support to a combination of (1) the romantic notion of authorship and (2) the pervasiveness of what she labelled the “Copyright Myth.” The copyright myth, according to Litman, is a rather romantic view of how copyright law works to protect authors and creators. According to this myth, copyright is something the creator gets when he sends his creation to the Copyright Office in Washington, but only if the work is deemed to be good enough. That copyright law might be as rigorous so as to stifle the act of creation itself is unheard of within the context of the copyright myth.<sup>114</sup>

The copyright myth, the romantic notion of authorship, and the natural rights argument Hettinger criticised are the three most important “deconstructive tools” — in the “boylean” sense of the word — of the second phase of the debate. What these three have in common is that they are notions which support intellectual property. As such, they belong to a discourse on intellectual property. At the same time, however, they influence how the public domain is understood, which makes them, and especially their deconstruction, belong to the public domain discourse. In addition to this kind of notions, however, there are two other kinds I wish to mention.

The first is what Litman has described as a naive understanding of laws in general. In her 1994 article “The Exclusive Right to Read,” Litman argued that one part of the problem is “that many people persist in believing that laws make sense.”<sup>115</sup> Any claim as to the irrationality or the malfunction of a law is met with the counterargument that the law does not say so, was not intended to be like that, or, perhaps, is “one of those laws, like the sodomy law, that it is okay to ignore.”<sup>116</sup> This “naive view of laws’ soundness” is a lot more general than con-

<sup>113</sup>Jaszi, “Toward a Theory of Copyright - The Metamorphoses of ‘Authorship’”, p. 459.

<sup>114</sup>Jessica Litman, “Copyright as Myth”, *University of Pittsburgh Law Review* 53, 1991, p. 237.

<sup>115</sup>Jessica Litman, “The Exclusive Right to Read”, *Cardozo Arts and Entertainment Law Journal* 13, 1994, p. 50.

<sup>116</sup>*Ibid.*, p. 50.



cepts within the sphere of ownership of intellectual creation, but it still influences the way people understand issues related to the public domain.

The second is the trope of the “Tragedy of the Commons,” which is a theory on the “tragic” properties of the public domain that originated in a discussion on tangible public domain and commons in the 1960s. To be more specific, the expression stems from Garrett Hardin’s 1968 article “Tragedy of the Commons,” where he portrayed the dangers of overpopulation by using the commonly owned grasslands of old England as a metaphor. If a pasture is open to all, argued Hardin, the rational choice of each herdsman will be to keep as many animals at the pasture as possible. The reason for this is that the positive utility of an additional animal is given to the herdsman, while the negative effects of overgrazing are shared by all the herdsmen. This will eventually lead to overgrazing, argues Hardin, which — tragically — destroys the pasture for all.<sup>117</sup>

Despite the fact that the article actually discussed overpopulation, Hardin’s “Tragedy of the Commons” has been put to use as an analysis of the “tragedy” of public ownership. As such, it has become an argument in favour of privatisation. Through a description of a number of examples of well-functioning publicly managed commons throughout history, Carol Rose attempts to deconstruct the notion of such a tragedy in her 1986 article “The Comedy of the Commons.”<sup>118</sup> Hence, this is an example of a notion about the malfunction of ownership organised through public domain and commons.

The argument of the “deconstructionists” of the modern debate on the public domain, e.g. Hettinger, Litman, and Boyle in his 1992 article “A Theory of Law and Information,” is that notions preclude an accurate understanding of the public domain both among scholars and in the general public. To Litman, for instance, the romantic notion of authorship and the widespread copyright myth have played important roles in creating a strong popular support for copyright. Taken together, it is fairly safe to say that the copyright myth, the romantic notion of authorship, the idea of an author’s natural right to his work, the naive view of laws, and the tragedy of the commons have influenced both popular and scholarly understanding of the public domain and restrained prospective resistance against strengthening intellectual property rights.

That said, the value and usefulness of deconstruction of illusions always stands the chance of being reverted by the creation of new illusions. In 2002, Scott Martin argued that this was what had happened within the modern debate on

<sup>117</sup>Garrett Hardin, “The Tragedy of the Commons”, *Science* 162, 1968.

<sup>118</sup>Carol Rose, “The Comedy of the Commons”, *University of Chicago Law Review* 53, 1986.

the public domain.<sup>119</sup> According to Martin, the philosophy behind some of the contributions within the debate began with the myth “copyright good, public domain better.”<sup>120</sup> Contrary to the deconstructive aims of scholars like Litman and Boyle, and instead of tearing down wrongful assumptions, Martin argued, the contributions to the debate had erected a number of myths about the nature and role of the public domain.

Martin’s use of the term “myth” is different from Boyle’s use of the term notion, however. To Martin, a myth is simply defined as “an unfounded or false notion [...] having only an imaginary or unverifiable existence.”<sup>121</sup> Martin’s myths are therefore not what I called “tools we employ to make sense of the world” above, and are probably best defined as “false assumptions.” And the false assumptions Martin focuses on are not related to notions like the romantic author. More precisely, Martin focuses predominantly on the legal authority of Congress related to the enactment of the Copyright Term Extension Act in 1998. As such, Martin’s article does not seem to be much about the “Mythology of the Public Domain” at all.

A more pertinent criticism of the typical argument within the modern debate on the public domain came from Edward Samuels, who in his 1993 article “The Public Domain in Copyright” asked: “What is gained by reifying the negative, and imagining a ‘theory’ of the public domain?”<sup>122</sup> Based on Boyle’s and Cohen’s theory on the usefulness of definitions I mentioned above, constructing a notion of the public domain should be useful if it “insures against risks of confusion more serious than any that the definition itself contains.” The usefulness of deconstructing illusions on authorship, natural rights, and so on, should therefore be measured against the risks of confusion caused by the construction of a notion of the public domain.

A similar criticism of the notion of the public domain was put forward by Anupam Chander and Madhavi Sunder in their 2004 article “The Romance of the Public Domain.” I am going to discuss this criticism in greater detail in Part IV, but I have chosen to briefly mention it here because of its “deconstructive” aspects. “Trapped in a discourse framed by Hardin’s law and economics prophecy,” Chan-

<sup>119</sup>I have chosen to include Martin’s 2002 article “The Mythology of the Public Domain,” as well as Anupam Chander’s and Madhavi Sunder’s 2004 article “The Romance of the Public Domain,” in this discussion on the deconstructive phase of the modern debate on the public domain despite the fact that they were written as late as the 2000s. The reason for this is that they are about notions and illusions regarding the public domain.

<sup>120</sup>Martin, “The Mythology of the Public Domain”, p. 255.

<sup>121</sup>Ibid., p. 254.

<sup>122</sup>Samuels, “The Public Domain in Copyright Law”.

der and Sunder wrote, “the literature regarding the commons remains impoverished, captured by a nearly single-minded concern for efficiency.”<sup>123</sup> Moreover, they argued that the proponents of the public domain had been lured by a “siren call,” and that the discourse on the public domain was increasingly dominated by a binary tenor “in which we must choose *either* intellectual property *or* the public domain.”<sup>124</sup> To Chander and Sunder, this “obscures other important interests, options, critiques, and claims for justice that are embedded in many new claims for property rights,” and the public domain was becoming a “source for exploiting the labor and bodies of the disempowered—namely, people of color, the poor, women, and people from the global South.”<sup>125</sup>

To sum up, it seems quite clear that this phase of the modern debate on the public domain represents a significant theoretical and conceptual development of the subject matter. In the early 1980s the public domain discourse was limited to an approach. Through deconstruction of notions related to intellectual property the modern debate on the public domain had by the early 1990s obtained at least a makeshift vocabulary and the rough outline of a theoretical framework — as well as self-consciousness regarding the methodology of the analyses.

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<sup>123</sup>Anupam Chander and Madhavi Sunder, “The Romance of the Public Domain”, *California Law Review* 92, 2004, p. 1333.

<sup>124</sup>*Ibid.*, p. 1334.

<sup>125</sup>*Ibid.*, p. 1335.

## Part III

# ANCHORING

## Replacing the Scaffolding and Falsework

It has been my argument that the public domain emerged from the copyright realm and became the 'coordinating principle' of a new social theory on free culture and immaterial rights, and that this process can be broadly categorised into four phases. I have already discussed the first phase, when the public domain discourse emerged with David Lange's 1981 article "Recognizing the Public Domain," as well as the second phase, when the participants of the debate made an attempt to "break away" from the confines of intellectual property by deconstructing notions that supposedly precluded an accurate understanding of the public domain. By analogy, the maturation of this second phase would be a kind of adolescent push for emancipation from "parental repression" — the kid just wants to move out. Continuing the analogy, the third phase of the debate can be recognised as the young adult searching for his roots. In this phase, the participants of the modern debate on the public domain embedded new concepts into the debate by anchoring their use of the concepts to the external discourses the concepts originated in.

At this point in time, however, the plain nature of the first and second phase of the debate was gone. The contributions belonging to the third and fourth phase are not as easily sorted and categorised as the contributions to the first and second phase, and the phases are no longer strictly successive. This is not only because the third and fourth phases are different aspects of the same reconstruction, however. It is, for instance, also possible to find embedding, and even modest examples of realisation, in some of the contributions belonging to the second phase. When Hettinger criticised the labour justification of property he based his analysis both on Nozick and Locke; when Litman described the romantic notion of authorship she based her analysis both on Foucault, Woodmansee and an early article by Boyle; and, when Boyle wrote about the treachery of images he based his analysis on Foucault, Felix Cohen, and, at least to a certain degree, Magritte.

That the later phases are not as clear-cut as the earlier phases does not mean that they are not useful in an analysis of the intellectual history of the modern debate on the public domain. It only means that it is harder to organise the data, that the placement of a certain author or article is ambiguous, and that the historian should be even more modest in his claims than usual.

In the following, I am going to describe three different attempts to anchor the public domain to other discourses. The first chapter is on an aesthetic, meaning an opinion on the nature of information. The chapter builds on the view of authoring inherent in Litman's critique of the romantic notion of authorship, and discusses the value of the public domain to creativity. More specifically, it includes a discussion on how Lewis Hyde's anthropological study of gift exchange has been used as a apology for the public domain. Following this, the second chapter is a description of Yochai Benkler's adaptation of Hyde's aesthetic analysis of gift exchange in the form of an economic theory on collaborative production, while the last chapter is a discussion on writings about the relationship between the public domain and different theories on political participation and the public sphere.

## The Aesthetic Beauty of Collaborative Creativity

In his 1957 book "Anatomy of Criticism," Northrop Frye wrote that "poetry can only be made out of other poems; novels out of other novels." A century earlier Justice Joseph Story wrote the following in his opinion in the 1845 Massachusetts Circuit Court case *Emerson v. Davies*: "Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before. [...] No man writes exclusively from his own thoughts, unaided and uninstructed by the thoughts of others."<sup>126</sup> In much the same way, John Donne, in his 1623 meditation "Devotions upon Emergent Occasions," famously wrote that "all mankind is of one author, and is one volume [...] no man is an island, entire of itself."<sup>127</sup> Despite claims to the contrary,<sup>128</sup> acknowledgement of the value of inspiration and the role of reuse in intellectual

<sup>126</sup> *Emerson v. Davies et al.*, 8 F. Cas. 615 (1918).

<sup>127</sup> John Donne, *Devotions upon Emergent Occasions, Meditation XVII*, (Michigan: The University of Michigan Press, 1959), pp. 107-109.

<sup>128</sup> Bollier, *Viral Spiral*, p. 63.

production was not a novelty of the new public domain discourse in the 1980s, nor with the advent of the internet.

Hettinger's "historical/social component" and Litman's "raw material available for other authors to use" belong to the same tradition as Frye, Story, and Donne. So did John Perry Barlow and James Boyle when they spoke about the nature of information, as well as Jonathan Lethem when he wrote about "source hypocrisy" in light of Lewis Hyde's analysis of the work of art as a gift. This chapter is therefore about the establishment of an aesthetic within the public domain discourse. Accordingly, I will begin this chapter with a short description of the basic analysis of the nature of information as it was prior to the attempts to embed an anthropological analysis of gift exchange to the public domain discourse. Then I will take a closer look at Lewis Hyde's "gift economy," before I turn to a discussion about the use of Hyde within the public domain discourse and the source hypocrisy of the market-based analyses of creativity.

## The Nature of Information

In his 1992 article "A Theory of Law and Information," James Boyle asserts that information issues as disparate as copyright, blackmail and insider trading are all challenged by a similar set of recurring patterns of contradictions which are caused by the duality of information in the marketplace. On one hand, information is a prerequisite for a competitive market. On the other hand, information is not created (or collected, if you will) without incentives from within the same market. This dilemma was the subject of Grossman and Stiglitz' renowned 1980 article "On the Impossibility of Informationally Efficient Markets," in which they concluded that "there is a fundamental conflict between the efficiency with which markets spread information and the incentives to acquire information."<sup>129</sup>

In his 1994 essay "The Economy of Ideas," John Perry Barlow argued that this dual role of information in the marketplace causes information to be "intangible and hard to define." According to Barlow, information "is a natural host to paradox"<sup>130</sup> because it cannot be easily described or analysed. Barlow therefore compared information to light. To understand the nature of light, it is helpful to "understand light as being both a particle and a wave." In the same way, Barlow argued, it might be helpful to view information as being both an *activity*, a *life form*, and a *relationship*.

<sup>129</sup>Sanford J. Grossman and Joseph E. Stiglitz, "On the Impossibility of Informationally Efficient Markets", *The American Economic Review* 70, 1980, p. 405.

<sup>130</sup>Barlow, "The Economy of Ideas".

Having said that, Barlow argued that the complex nature of information has been disregarded by intellectual property law. With copyright, for instance, information is blatantly cut in two. To Barlow, copyright is a “franchise” on the expression (meaning the “precise turn of phrase used to convey a particular idea”<sup>131</sup>), while the idea is seen as the “collective property of humanity.” Barlow: “The bottle was protected, not the wine.”<sup>132</sup> This forces information to be analysed through a simplistic idea vs. expression dichotomy. And owing to the fact that intellectual property is built on top of the simplification inherent in such a binary understanding of information, Barlow argued, it is susceptible to error. How many of our assumptions about information, Barlow queried, “have actually been about its containers rather than their mysterious contents?”<sup>133</sup>

In an attempt to explain the background of this simplification, Boyle analysed the idea-expression dichotomy in light of marketisation. In Boyle’s view, two processes govern the typical way we try to deal with the complex nature of information. The first process is by calling upon the image of information production inherent in the romantic notion of authorship, which makes it easier to justify appropriation. Based on this understanding of what can reasonably be appropriated, the second process is to assign — Boyle used the word “pigeonhole” — information into stereotypes of “public” and “private.” To Boyle, the bifurcation of books into “ideas” on one hand and “expressions” on the other originated in this public-private dichotomy so essential to marketisation. This division gives us the opportunity, Boyle wrote, to “give the idea (and the facts on which it is based) to the public world and the expression to the writer, thus apparently mediating the contradiction between public good and private greed.”<sup>134</sup>

In the following, I am going to discuss how Boyle’s and Barlow’s analyses of (1) the idea-expression dichotomy and (2) the public-private dichotomy were expanded through anchoring the analysis to Lewis Hyde’s “gift economy.”

## **Gift Exchange in the Relationship of Master and Apprentice**

The analysis of gift exchange has a rich tradition in anthropology going all the way back to Marcel Mauss’ 1924 essay “*Essai sur le don*” (The Gift: The Form and Reason for Exchange in Archaic Societies). It was Lewis Hyde’s 1983 book “*The Gift*” that brought an analysis of gift exchange into the modern debate

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<sup>131</sup> Ibid.

<sup>132</sup> Ibid.

<sup>133</sup> Ibid.

<sup>134</sup> Boyle, “A Theory of Law and Information”, p. 1469.

on the public domain, however. Hyde himself did not speak explicitly about a Langean public domain, and only mentioned intellectual property once. Anchoring the public domain discourse to this anthropological analysis of gift exchange was done by, among others, David Bollier in his 2002 book “Silent Theft,” Yochai Benkler in his 2002 article “Coase’s Penguin, or, Linux and *The Nature of the Firm*,”<sup>135</sup> Jonathan Lethem in his 2007 essay “The Ecstasy of Influence,” and Lewis Hyde himself, in the afterword to a 2006 reprint of “The Gift.” Again, my use of Hyde is not meant as an exegesis of his thoughts. Rather, I focus only on those parts which are relevant to the public domain debate; and I describe the interpretation of Hyde common in Bollier’s, Benkler’s, and Lethem’s writings.

In the tradition of Mauss and, among others, Marshall Sahlins, Hyde argued that some kinds of production and distribution should be seen as a “gift exchange.” People live differently, Hyde wrote, “who treat a portion of their wealth as a gift.”<sup>136</sup> Contrary to commodity exchange, gift exchange creates a relationship between its participants. One example is the dinner ritual in which the participants pour wine into their neighbour’s glass, and vice versa. Economically speaking not much has happened, but, Hyde writes, “society has appeared where there was none before.”<sup>137</sup>

In the context of art, Hyde claimed that budding artists are inspired to become artists “when their own nascent gifts are awakened by the work of a master.”<sup>138</sup> The “awakening” of an apprentice can happen briefly, like the sudden stimulus that might come from seeing a masterpiece like Da Vinci’s *Mona Lisa* or listening to a piano virtuoso play Rachmaninov’s third piano concert; or over a longer period of time, like the relationship between the master and the apprentice. At the beginning of his career, the apprentice is taught the skills of the trade by the master. The apprentice cannot express his gratitude to the master in any other way than through acknowledgement and due regard, however. As such, the apprentice, when he is ready, will show his gratitude and give back some of what was given to him by taking on an apprentice himself. This kind of gift is what Hyde calls a gift of transformation. The transformation is complete when the apprentice is ready to give the gift on his own terms. Passing the gift along is “the act of gratitude that finishes the labor.”<sup>139</sup>

<sup>135</sup>Actually, Benkler did *not* mention Hyde, but, rather, Mauss, Sahlins, Hagstrom, Merton, etc.

<sup>136</sup>Hyde, *The Gift*, p. xvi.

<sup>137</sup>*Ibid.*, p. 58.

<sup>138</sup>*Ibid.*, p. 48.

<sup>139</sup>*Ibid.*, p. 48.



According to Hyde, there is a group of folk tales concerning this labour of gratitude. One of these tales is the story about “The Shoemaker and the Elves.” The story goes like this: One night, the shoemaker is visited by two elves, who makes one pair of shoes from leather the shoemaker has cut. The shoes are sewn perfectly, “not a stitch is out of place.” Hyde continues:

The shoes are such a masterpiece that the first customer to appear in the morning pays handsomely for them, and the cobbler has enough money to buy leather for two pair of shoes. That night he cuts the leather and goes to bed. Again in the morning the shoes are made, and again they sell for such a price as to afford the leather for four pairs of shoes. In this way the shoemaker soon prospers.<sup>140</sup>

At some point, however, the shoemaker and his wife becomes curious as to who it is that are helping them. They decide to leave a candle burning and hide behind some coats. At midnight, they see the elves enter the room and get to work. Hyde continues:

In the morning the wife says to the shoemaker, “The little men have made us rich and we should show our gratitude for this. They’re running about with nothing on and might freeze! I’m going to make them each a shirt, coat, jacket, trousers and a pair of stockings. Why don’t you make them each a pair of little shoes.” The cobbler willingly agrees, and one night when the clothes are finished he lays them out on the bench in place of the leather. He and his wife hide behind the coats to watch. The elves are surprised and pleased to find the clothes. They put them on and sing—

We’re sleek, we’re fine, we’re out the door,  
We shan’t be cobblers any more!

And they dance around the room and away. They never return, but everything continues to go well with the shoemaker and he prospers at whatever he takes in hand.<sup>141</sup>

Just as with the apprentice and the master, the tale describes a gift of transformation. The elves carries with them the gift of talent, and gives it to the shoemaker. “The process is always a bit mysterious,” writes Hyde, and it is no surprise that it begins while he is asleep. Hyde:

You work at a task, you work and work and still it won’t come right. Then, when you’re not even thinking about it, while spading the garden or stepping into the bus, the whole thing pops into your head, the missing grace is bestowed. That’s the elves, the “magic touch” by which our tasks take on life.<sup>142</sup>

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<sup>140</sup>Ibid., p. 49.

<sup>141</sup>Ibid., p. 49.

<sup>142</sup>Ibid., p. 50.

But it does not end there. The gift must be passed along. As mentioned above, the transformation is not complete until the apprentice is ready to give the gift on his own terms. In the story, this is manifested by the nakedness of the elves. The shoemaker and his wife makes clothes for the elves, which then represents the passing along of the gift. Clothing something is a kind of acknowledgment, as I mentioned in Part II, it is “like giving it a name.”<sup>143</sup> Without giving the gift away, it cannot be fully realised. Hyde: “[T]hose who will not acknowledge gratitude or who refuse to labor in its service neither free their gifts nor really come to possess them.”<sup>144</sup>

Holding on to the gift thus terminates the gift exchange. The elves are freed when the cobbler gives as a gift to the elves the very first pair of shoes he created himself (all the other shoes were created by the elves). If the cobbler had not given away the shoes, the elves would not have been freed. Hyde wrote: “What is given away feeds again and again, while what is kept feeds only once and leaves us hungry.”<sup>145</sup>

## Source Hypocrisy — Stoppering the Bottle

The essence of Hyde’s analysis of gift exchange is that certain kinds of human interaction will only flourish, or perhaps even be possible at all, if an exchange of gifts is at the center of the interaction. As mentioned in Part I, the Englishman who placed the Indian pipe on his mantelpiece took the pipe out of circulation and thereby obstructed formation of social bonds between the Englishman and the Indians. Accordingly, it is the reciprocal nature of the gift exchange that brings people together.

To Hyde, this is especially true with art. “Where there is no gift,” Hyde wrote, “there is no art.”<sup>146</sup> Consequently, the artist who does not “free the elves” by giving something back destroys the gift exchange. Jonatham Lethem argued that the work of the Walt Disney Company is a good example of this. To Lethem, Disney is “the most pernicious source hypocrites of all time.” A large number of works in Disney’s portfolio draws directly upon the works of others. Lethem mentioned both “Snow White and the Seven Dwarfs, Fantasia, Pinocchio, Dumbo, Bambi, Song of the South, Cinderella, Alice in Wonderland, Robin Hood, Peter Pan, Lady and the Tramp, Mulan, Sleeping Beauty, The Sword in the Stone,

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<sup>143</sup>Hyde, *The Gift*, p. 51.

<sup>144</sup>*Ibid.*, p. 51.

<sup>145</sup>*Ibid.*, p. 21.

<sup>146</sup>*Ibid.*, p. xv.

The Jungle Book, [and] Treasure Planet.” But Disney does not acknowledge this and, according to Lethem, does not give back any of that which has been given to them. Rather, Disney threatens legal action whenever someone tries to reuse some of their characters. Lethem wrote that “for every James Joyce or Woody Guthrie or Martin Luther King Jr., or Walt Disney, who gathered a constellation of voices in his work, there may seem to be some corporation or literary estate eager to stopper the bottle: cultural debts flow in, but they don’t flow out.”<sup>147</sup> Disney, to use Hyde’s words, removes the indian “pipe” — Dumbo, Bambi, Pinocchio, etc. — from the gift circulation and “sets it on the mantelpiece.”<sup>148</sup>

To Hyde, not feeling any gratitude and not acknowledging the gift of the elves — the muses in the shoemaker story — is narcissism. Hyde: “The narcissist feels his gifts come from himself.”<sup>149</sup> This view is similar to Emily Nussbaum, who described the narcissistic artist as follows: “For so many artists, the act of creativity is intended as a Napoleonic imposition of one’s uniqueness upon the universe - après moi le déluge<sup>150</sup> of copycats!”<sup>151</sup>

Hyde explicitly stated, however, that the work of art was not necessarily destroyed if it was sold in the marketplace. Commercialisation is not exclusively narcissistic. Some parts of the work of art can survive as a gift even though the work itself is recast as a commodity. More accurately, then, his argument was that a work of art requires a certain degree of gift exchange. Art cannot exist *purely* as a commodity. If we deny the gift aspect of the work of art, we run the risk of destroying it completely.

Hyde’s analysis of gift exchange can thus be seen as an attempt to criticise neo-liberal ideology for advocating a Manichaeian world view in which the market is in the light and anything outside of the market is in darkness. This is remarkably similar to Boyle’s view in his 2001 article “The Second Enclosure Movement,” in which he wrote that “there is no real discussion of the world *outside* of intellectual property.”<sup>152</sup>

To Hyde, assessing the worth of something based on its exchange value in the marketplace is just too simple. First, the economics is incomplete. In addition to exchange in the marketplace, Hyde argued, there exists several kinds of gift

<sup>147</sup>Lethem, “The ecstasy of influence - A plagiarism”, p. 65.

<sup>148</sup>Hyde, *The Gift*, p. 3.

<sup>149</sup>Ibid., pp. 54-55.

<sup>150</sup>“After Me Come the Floods,” normally attributed Louis XIV.

<sup>151</sup>Emily Nussbaum, “Urban Appetites, The Collected Poems of Kenneth Koch”, 2005. [http://www.nytimes.com/2005/12/11/books/review/11nussbaum.html?\\_r=1&sq=napoleonic%20imposition&st=cse&scp=1&pagewanted=print](http://www.nytimes.com/2005/12/11/books/review/11nussbaum.html?_r=1&sq=napoleonic%20imposition&st=cse&scp=1&pagewanted=print) (May 11, 2009).

<sup>152</sup>Boyle, “The Second Enclosure Movement”, p. 57.

exchange. Just like market-based exchange, gift exchange is a social structure that regulates ownership to and use of a particular set of assets. In a number of cases, Hyde argued, gift exchange is — also economically — a more efficient organising principle of production and distribution than the marketplace. Second, economics cannot measure all that is valuable to us. Not everything can be counted and priced. A certain object may have “worth” even though it has no exchange “value.”

This bisection into the commodity part and the gift part of the work of art underlying Hyde’s criticism of marketisation is similar to Barlow’s and Boyle’s idea-expression dichotomy, but his analysis of the nature of the gift part of the work of art is far more complex than Barlow’s and Boyle’s. Hence, it was as an analysis of the gift part of art that Hyde’s work was incorporated into the public domain discourse. In this process the analysis was extended from Hyde’s analysis of art to an analysis of knowledge and information more generally.

Similar to Hyde’s argument that a partial commodification not necessarily threatens the gift aspect of the work of art, few, if any, of the participants in the modern debate on the public domain has ever argued that knowledge and information cannot be appropriated and commodified at all. Edward Samuels criticised the early contributions to the public domain debate in his 1993 article “The Public Domain in Copyright,” and argued that “there is a fallacy in jumping from the observation that no work is *totally* original to the conclusion that no work is *at all* original, or that we can’t find some originality even in modest works.”<sup>153</sup> Such an unconditional and absolute argument had not been made within the first and second phase of the debate, however, and with the incorporation of Hyde’s analysis of gift exchange, the disapproval of such absolute claims only grew stronger. On the contrary, all the participants in the debate seem to have acknowledged the idea-expression dichotomy. What they react to is the tendency to ignore the “idea”-side (i.e. the public domain), and that the work of art can — and should — be fully appropriated and commodified. To Boyle, this threat to the public domain comes from a “second enclosure movement” enclosing the intangible commons of the mind.<sup>154</sup>

Barlow described this shift as a result of the intellectual property industry’s response to digitisation and the internet. The prospect of the “bottles” becoming redundant because information could be shared without physical objects like books and CDs, Barlow argued, caused the intellectual property industry to re-

<sup>153</sup>Samuels, “The Public Domain in Copyright Law”.

<sup>154</sup>Boyle, “The Second Enclosure Movement”, p. 37. The second enclosure movement is the successor to the English enclosure movement of the sixteenth and seventeenth centuries.

spond by claiming ownership of more and more “wine,” thus shifting the traditional balance between idea and expression. Barlow:

What was previously considered a common human resource, distributed among the minds and libraries of the world, as well as the phenomena of nature herself, is now being fenced and deeded.<sup>155</sup>

Contrary to Barlow, the later Hyde, Boyle, and Lethem found the source of this shift in a simplification of the analysis of production and distribution to a market vs. non-market dichotomy. In this simple market-based analysis of production, the gift aspect of the production of knowledge and information is blatantly ignored. Due to the primacy of the neoliberal ideology, Hyde argued, a number of objects that have “worth” are trivialised and underpriced because they have no “value” in the marketplace.

In the new 2006 afterword to “The Gift,” Hyde maintained that “the ever-expanding reach of copyright has removed more and more art and ideas from the public domain,” and that “this period of market triumphalism” has in sum “seen a successful move to commercialize a long list of things once thought to have no price, and to enclose common holdings, both natural and cultural, that we used to assume no one was allowed to take private.”<sup>156</sup>

## The Collaborative Aesthetic of Public Domain

This analysis of the nature of information is closely associated with the deconstructive phase of the modern debate on the public domain, and especially the romantic notion of authorship. At the same time, the embedding of notions from information economics as well as certain theories from within the anthropological study of gift exchange can be said to have developed the analysis into a theory on the nature of sharing — a collaborative aesthetic. The core of this aesthetic is still the simple, and mostly negatory, argument that “the [romantic] author vision blinds us to the importance of the commons—to the importance of the raw material from which information products are constructed;”<sup>157</sup> but in addition to this a more meticulous analysis was incorporated through the use of ideas from Hyde, Frye, Story, Donne, etc.

As Frye wrote, human beings do not create *ex nihilo*, out of nothing. “Just as a new scientific discovery manifests something that was already latent in the order

<sup>155</sup>Barlow, “The Economy of Ideas”.

<sup>156</sup>Hyde, *The Gift*, p. 293.

<sup>157</sup>Boyle, *Shamans, Software, and Spleens*, p. xiv.

of nature and at the same time is logically related to the total structure of the existing science,” Frye wrote, “so the new poem manifests something that was already latent in the order of words.”<sup>158</sup> Claiming “authorship” of knowledge and information is therefore a simplification, disrespectful of the collaborative nature of creation. Barlow: “They act as though these ideas appeared in splendid detachment from all previous human thought.”<sup>159</sup> Hyde explicitly acknowledged the fact that a part of the work of art can be commodified without destroying the production of knowledge and information, however. It was the source simplification of commodification that was criticised. An unconditional commodification ignoring the gift aspect run the risk of destroying production itself. After all, “ideas do not circulate freely when they are treated as commodities.”<sup>160</sup>

This argument is similar to the argument from the deconstructive phase of the debate in that it can be described as a utilitarian justification based on a simplistic notion that “more” is “better,” and, correspondingly, that a strong public domain would increase the output of production. The conclusion that can be drawn from this analysis is therefore that an excessive marketisation is economically inefficient. The analysis of the collaborative aesthetic is more specific, however. In this view, economic efficiency is only one parameter. There exist something which have worth without having exchange value in the marketplace: “A young poet can stand the same supper of barley soup and bread, night after night,” Hyde wrote, “if he is on a walking tour of Italy and much in love of beauty.” To the young poet, beauty is more important than economic efficiency. As such, “artists whose gifts are strong, accessible, and coming over into their work may, as Marshall Sahlins says of hunters and gatherers, ‘have affluent economies, their absolute poverty notwithstanding.’”<sup>161</sup> The argument was therefore expanded from incorporating only an analysis of *whether* art would be created to what *kind* of art would be created. Instead of the simplistic economic parameter “more,” it is argued that a public domain-based production results in “better” and more “beautiful” products. After all, Hyde wrote that there is no “art” where there is no “gift.” Inherent in this argument is a normative view of “art” not only as a technical label for objects like paintings, sculptures, poems, etc., but also as a qualifier requiring the work of art to have a certain beauty and emotional power.

The participants in the public domain debate did not argue that *nothing* would have been created without a public domain. The two most important arguments that can be drawn from the collaborative aesthetics that was created by incor-

<sup>158</sup>Frye, *Anatomy of Criticism - Four Essays*, p. 97.

<sup>159</sup>Barlow, “The Economy of Ideas”.

<sup>160</sup>Hyde, *The Gift*, p. 84.

<sup>161</sup>*Ibid.*, p. 282.

porating the tradition of Frye, Story, and Donne, as well as the analysis of gift exchange represented by Hyde, into the public domain discourse, are (1) less will be created without a strong public domain, and (2) that which is created is not as beautiful. As I will get back to in Part IV, this aesthetic was later extended to include a view of the process itself as valueable to society.

## The Economics of Commons-Based Peer Production

One of the most explicit descriptions of a gift economy and its relationship to the public domain was Yochai Benkler's analysis of "commons-based peer production." As such, my second example of how the public domain discourse was expanded by embedding certain concepts from other discourses is closely associated to the first. The approach is more economic than anthropological or aesthetic, however. It thereby expands the public domain discourse with arguments within an economic frame of reference.

In his 2002 article "Coase's Penguin, or, Linux and *The Nature of the Firm*," Benkler described a new production mode that came into existence with the advent of internet. To him, it made "sense to focus on cultural or sociological characteristics of peer communities as a central explanation of peer production,"<sup>162</sup> and he mentioned both classic anthropological treatment of the subject like Mauss and Sahlins, newer treatments of gift exchange in other areas like Warren Hagstrom's and Robert Merton's analyses of gifts in science, and more recent applications of similar theories like in Eric Raymond's 1997 essay "The Cathedral and the Bazaar."<sup>163</sup> Benkler chose to base his analysis on an economic framework, however, because he saw it as important to "establish its baseline plausibility as a sustainable and valuable mode of production within the most widely used relevant analytic framework."<sup>164</sup>

<sup>162</sup>Yochai Benkler, "Coase's Penguin, or, Linux and The Nature of the Firm", *Yale Law Journal* 112, 2002, p. 400.

<sup>163</sup>Eric Raymond, "The Cathedral and the Bazaar", 1997. <http://www.catb.org/~esr/writings/cathedral-bazaar/cathedral-bazaar/index.html> (May 11, 2009).

<sup>164</sup>Benkler, "Coase's Penguin, or, Linux and The Nature of the Firm", p. 401.

## The Nature of the Firm

Because he saw economics as the “most widely used relevant analytic framework,” Benkler began with Ronald Coase’s classic analysis of production.<sup>165</sup> According to Coase, there exists two modes of production. First, production can be organised in the marketplace, using the price mechanism. Second, production can be organised within a firm. With no transaction costs, the market is always the most efficient mode of production. To Coase, the reason firms emerge — a question Benkler asked in the following way: “Why clusters of individuals operate under the direction of an entrepreneur, a giver of commands, rather than interacting purely under the guidance of prices”<sup>166</sup> — is that there will always be transaction costs associated with a marked mode of production (i.e. gathering information about suppliers, organising a bidding process, and so on). This implies that some products might be more efficiently manufactured within the coordinated sphere of a firm, which is defined as a “system of relationships which comes into existence when the direction of resources is dependent on an entrepreneur.”<sup>167</sup> Also, Coase noted, improvements within the managerial technique tend to increase the size of firms, while a reduction of the transaction costs tends to reduce the size of firms.

Benkler’s argument was that there existed a third mode of production, which he called “commons-based peer production.” This mode of production exists within the digitally networked environment, and is characterised by small or large groups of people not following “market prices or managerial commands,” but, rather, a diverse cluster of motivational drives and social signals.<sup>168</sup> In his 1997 essay “The Cathedral and the Bazaar,” Raymond described the difference between a firm-based production mode and peer production by labelling the production modes “cathedral” and “bazaar.” To Raymond, software could either be built “like cathedrals, carefully crafted by individual wizards or small bands of mages working in splendid isolation”; or more or less “emerge” from a community that “seemed to resemble a great babbling bazaar of differing agendas and approaches.”<sup>169</sup> To Benkler, free software, which was what Raymond wrote about, is an important and highly visible example of this mode of production, but not the only one. Contrary to the property centered market-based

<sup>165</sup>Coase won the Nobel Price in Economics in 1991 for his work on externalities and transaction costs, especially his 1937 article “The Nature of the Firm” and his 1960 article “The Problem of Social Cost.”

<sup>166</sup>Benkler, “Coase’s Penguin, or, Linux and The Nature of the Firm”, p. 400.

<sup>167</sup>Ronald Coase, “The Nature of the Firm”, *Economica* 4, 1937, p. 393.

<sup>168</sup>Benkler, “Coase’s Penguin, or, Linux and The Nature of the Firm”.

<sup>169</sup>Raymond, “The Cathedral and the Bazaar”.



and managerial-based modes of production, commons-based peer production is centered around commonly available material: “The inputs and outputs of the process are shared, freely or conditionally, in an institutional form that leaves them equally available for all to use as they choose at their individual discretion.”<sup>170</sup>

It is interesting to note that instead of using the term “public domain” and arguing that the information should be “free as air to common use,” Benkler used words like “shared” and “equally available for all to use at their discretion.” This is also the reason he called this mode of production “commons-based,” and not “public domain-based.” Commons, Benkler argued, are characterised by two parameters: (1) Whether the resource is common to all or just to a well defined-subset of people; and (2) Whether the resource is regulated or not. If the resource is only common to a small subset, however, it might more correctly be identified as a “common property regime.” In the case of commons-based peer production, the resource must either be common to all or at least to a large subset of people. Also, any regulation that inhibits or constrains the use of the resource must be symmetric among all users for the resource to be a proper commons.<sup>171</sup> Benkler expressed this clearly in his 2006 book “*The Wealth of Networks*,” which, at least to a certain extent, can be seen as an elaboration on his analysis of commons-based peer production in the 2002 article “Coase’s Penguin”: “The salient characteristic of commons, as opposed to property, is that no single person has exclusive control over the use and disposition of any particular resource in the commons.”<sup>172</sup>

Accordingly, Benkler’s commons-based peer production is a production mode in which the resources flow freely inside a heterogeneous and decentralised group of people. This group of people is not a rigid, hierarchical structure like that of a firm, but a flexible and open-ended network. It goes without saying that production is often organised in some way or another, but this does not diminish the flexibility of the system due to the fact that the resources are common to all. If participants on a free software project disagrees with the people in charge of the project, for example, they might create their own project and build upon the source code that has already been developed. This insures against two risks identified by Raymond. First, people participating in such peer production does not have to, as Raymond put it, “spend their days grinding away for pay at programs which they neither need nor love.”<sup>173</sup> According to Raymond, the fact that

<sup>170</sup>Yochai Benkler, *The Wealth of Networks*, (London: Yale University Press, 2006), p. 62.

<sup>171</sup>Benkler, “Coase’s Penguin, or, Linux and The Nature of the Firm”, p. 64.

<sup>172</sup>Benkler, *The Wealth of Networks*, p. 61.

<sup>173</sup>Raymond, “The Cathedral and the Bazaar”.

decisions about production are made by the participants and not by a supervisor insures against unnecessary production — decisions about production are based on real need. Raymond's first rule of Bazaar production of software is therefore that "every good work of software starts by scratching a developer's personal itch."<sup>174</sup> Second, peer production often involves more people, which means that the product will be reviewed by more people. This increases the likelihood of finding and correcting errors. Raymond: "Given enough eyeballs, all bugs are shallow."<sup>175</sup>

## Avoiding the Tragedy

According to the "Tragedy of the Commons" trope, as I discussed in Part II, a production mode like this is quixotic and unfeasible. The "participants" would appear to be participating, while their real intention would be to freeride other people's work. As such, any attempts at commons-based peer production would collapse. But, Benkler argued, a number of examples shows that this is not the case. In addition to a large number of free software projects, as mentioned above, Benkler discussed the "participatory internet" web sites NASA Clickworkers project, Wikipedia, Slashdot and Project Gutenberg. All of these are commons-based peer production projects, which according to the "Tragedy of the Commons" trope should have collapsed a long time ago. Instead, Benkler argued, these examples show (A) that human beings are not only motivated by economic incentives, and that certain features of the project (B) will enhance participation to such a degree as to thwart the free rider-problem.

(A) The problem with the "Tragedy of the Commons" trope, according to Benkler, is that it has misconstrued the role of economic incentives. To begin with, it ignores glory. As Camden claimed in the 1774 House of Lords case *Donaldson v. Beckett*, "Glory is the Reward of Science [...] It was not for Gain, that *Bacon, Newton, Milton, Locke*, instructed and delighted the World"<sup>176</sup> A more recent criticism of the "tragic" analysis of incentives can be found in Eben Moglen's 1999 essay "Anarchism Triumphant," where he introduced a corollary to Faraday's law. Faraday's law is the law of induction. If you wrap a coil of wire around a magnet and spins the magnet, current flows through the wire. But, as Moglen noted, "we don't ask what the incentive is for the electrons to leave home."<sup>177</sup> Rather, the

<sup>174</sup>Raymond, "The Cathedral and the Bazaar".

<sup>175</sup>*Ibid.*

<sup>176</sup>Camden in Rose, *Authors and Owners - The Invention of Copyright*, pp. 104-105.

<sup>177</sup>Eben Moglen, "Anarchism Triumphant", 1999. <http://emoglen.law.columbia.edu/my-pubs/anarchism.html> (May 11, 2009).

current results from an “emergent property of the system.” As such, Moglen’s Metaphorical Corollary to Faraday’s Law says that:

If you wrap the Internet around every person on the planet and spin the planet, software flows in the network. It’s an emergent property of connected human minds that they create things for one another’s pleasure and to conquer their uneasy sense of being too alone.<sup>178</sup>

(B) Besides the fact that human beings are motivated by more than just economic incentives, Benkler identified three main reasons these projects worked: (1) That they were modular, i.e. that they could be broken up into little pieces that can be produced independently of each other; (2) that the granularity of these pieces were flexible enough to “accommodate variously sized contributions,” i.e. that at least some of the pieces were small enough to “capture contributions from large numbers of contributors whose motivation level will not sustain anything more than quite small efforts towards the project;”<sup>179</sup> as well as (3) that the modules could be easily integrated in the end.

The Distributed Proofreading project, a side project to Project Gutenberg, is an appropriate example. First, Distributed Proofreading split each book up in individual pages that could be proofread independently; second, proofreading one page was a small enough effort to attract a large number of contributors and the flexibility was preserved simply by letting more enthusiastic contributors read more than one page at a time; and third, the proofread pages were integrated easily by being automatically added to the finished book.<sup>180</sup> The success of the Distributed Proofreading project is, to a large extent, owing to the fact that the proofreading was broken into single page modules. The single page modules made it a lot easier to get involved than with the original approach, in which one module encompassed one book. The difference between proofreading a single page and proofreading a whole book illustrates the importance of granularity well.

## The Economics of Non-Regulated Cooperation

At this point, it might not be clear how Benkler’s approach is different from the collaborative aesthetic. As I mentioned in the beginning of this chapter, Benkler himself acknowledged that an analysis of commons-based peer production could reasonably be based on the anthropology of gift exchange. Contrary

<sup>178</sup>Ibid.

<sup>179</sup>Benkler, “Coase’s Penguin, or, Linux and The Nature of the Firm”, p. 379.

<sup>180</sup>Ibid., p. 29.

to the “production” analysed by the collaborative aesthetic, however, Benkler’s commons-based peer production emerged with the development of internet. It can certainly be argued that some sort of commons-based peer production, meaning people creating something without following “market prices or managerial commands,” also existed before the advent of internet. Most of the properties of such creation can be recognised in non-commercial science and art. But, in non-commercial science and art the activity is not really “production.” It is better described by the word “creation,” which calls for a small semantical digression.

In the following I am going to distinguish between two kinds of production: “creation” and “fabrication.” This distinction is similar to Hyde’s distinction between “labour” and “work.” Work, Hyde wrote, “is what we do by the hour. It begins and ends at a specific time and, if possible, we do it for money.”<sup>181</sup> His examples of “work” include “welding car bodies on an assembly line [...] washing dishes, computing taxes, walking the rounds in a psychiatric ward, picking asparagus.” Labour, on the other hand, “sets its own pace.” If we are paid it can still be labour, but it is harder to quantify. Hyde:

‘Getting the program’ in AA is a labor. It is likewise apt to speak of ‘mourning labor’: when a loved one dies, the soul undergoes a period of travail, a change that draws energy. Writing a poem, raising a child, developing a new calculus, resolving a neurosis, invention in all forms — these are labors.<sup>182</sup>

This means that the “production” inherent in non-commercial science and art, which I have called “creation,” is similar to what Hyde labelled “labour.” On that account, the activities of non-commercial science and art is precisely what is analysed in the collaborative aesthetic I described in the first chapter of Part III. Benkler’s commons-based peer production, on the other hand, is an analysis of a mode of “production” I called “fabrication,” which is similar to Hyde’s “work.”

When Benkler chose to analyse this production in light of Coase’s economic theory on the nature of the firm, because it was the “most widely used relevant analytic framework,” Benkler introduced a separate analysis of the public domain, different from the collaborative aesthetic. Benkler is therefore correct to say that “commons-based peer production” exists exclusively within the digitally networked environment.

Still, there exists a certain degree of overlapping. The most evident example of work is Project Gutenberg. Even though the content is definitely creative, the

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<sup>181</sup>Hyde, *The Gift*, p. 51.

<sup>182</sup>Ibid., p. 51.

activity of scanning, proofreading, and uploading can only be described as work. This is also the case with the NASA Clickworkers project. Wikipedia, on the other hand, is more complicated. As long as it is strictly an encyclopedia, collecting information to be published on the web site is work in much the same manner as Warren Hagstrom described the writing of text books. Writing a text book, Hagstrom argued, is work done for pay, while research is labour done expecting honour and respect in return.<sup>183</sup> This means that writing for Wikipedia is labour when it includes a creative aspect. Mostly, however, Wikipedia is work. The same is true for open source software projects. A large part of the typical open source software project is work, even though some parts of it involves creative labour.

## The Political Role of the Public Sphere

Some of the most interesting cases of anchoring are when the term “public domain” is actually used verbatim within the external discourse, but not in the Langean sense. One example of this is in the political context. In his 1993 article “The Public Domain,” Algis Mickunas did not write about a Langean public domain, and is not a part of the modern debate on the public domain as such. Rather, he wrote about what I am going to call a “Mickunian” public domain, and his analysis is a rather straightforward example of a public sphere-tradition that has been embedded into the public domain discourse. To Mickunas, the public domain is a prerequisite for a democratic political society: “Autonomous freedom implies a life under freely posited, debated, and rationally examined rules. Such an achievement is a matter of public debate and consensus.”<sup>184</sup> The Mickunian public domain is therefore a public sphere “in which all members of a community participate in the establishment and maintenance of [...] the rules by which they will govern their lives and deal with the environment.”<sup>185</sup> Anchoring the Langean public domain to such analyses of political participation and the public sphere

<sup>183</sup>Warren O. Hagstrom, “Gift giving as an organizing principle in science”. In: *Science in Context - Readings in the Sociology of Science*, ed. by Barry Barnes and David Edge, Milton Keynes: The Open University Press, 1982.

<sup>184</sup>Algis Mickunas, “The Public Domain”. In: *Open Institutions*, ed. by John W. Murphy and Dennis L. Peck, Westport: Praeger Publishers, 1993, pp. 177–192, p. 181.

<sup>185</sup>*Ibid.*, pp. 180-181.

is an attempt to create a case for the public domain by exhibiting how valuable access to knowledge and information is to a democratic society.

In this chapter, I am going to focus on the two most important political theories the public domain has been associated with. The first one is Walter Benjamin's analysis of "The Work of Art in the Age of Mechanical Reproduction," which illustrates the difference between consumption and participation. The second one is analyses of the public sphere, which relates the public domain and the political conversation of a democracy.

## The Different Modes of Participation

In his 1935 essay "The Work of Art in the Age of Mechanical Reproduction," Walter Benjamin wrote about the transformation of art due to the introduction of mechanical reproduction. The essay was written while Benjamin lived in exile in Paris, and it can be interpreted as a rather desperate attempt to create a marxian aesthetic that would be useless to the nazis.<sup>186</sup> Routinely, especially within the context of the public domain discourse, this historical context has been blatantly disregarded. It is one of those texts, like the Bible, in which we never seem to settle on an interpretation. It is applauded, admired, dismissed, and despised, seemingly all at once. The fact that several inconsistent revisions were published did not mitigate this motley reception. My aim is therefore not to do a historical exegesis of Benjamin's essay. Rather, my description of the essay is intended to be as similar to the typical interpretation within the modern debate on the public domain as possible.

To Benjamin, the mechanically reproduced work of art is given meaning through the encounter between the work of art itself and its audience. This encounter was itself a result of the invention of mechanical reproduction. Traditionally, the work of art was a ceremonial object surrounded by aura and "destined to serve in a cult."<sup>187</sup> It was authentic, and had a unique existence at "the place where it happens to be."<sup>188</sup>

Contrary to this, the mechanically reproduced work of art is unoriginal, and the reproduction replaces the unique existence with a plurality of copies. The reproduction has no aura, and looking for the "authentic" copy does not make sense.

<sup>186</sup>Torodd Karlsten, "Walter Benjamin". In: *Kunstverket i reproduksjonsalderen*, ed. by Walter Benjamin, Gyldendal norsk forlag, 1975, p. 15.

<sup>187</sup>Walter Benjamin, "The Work of Art in the Age of Mechanical Reproduction". In: *Illuminations*, New York: Schocken Books, 1969, pp. 217–251, p. 224.

<sup>188</sup>*Ibid.*, p. 220.

The reproduction therefore causes what Benjamin calls a “tremendous shattering of tradition.” Not only is the work of art released from the domain of tradition through a “liquidation of the traditional value of the cultural heritage,”<sup>189</sup> the distance between the work of art and its beholder is also reduced. Traditionally, the beholder would have to come to the work of art. Through mechanical reproduction, the work of art comes to the beholder. And in “permitting the reproduction to meet the beholder or listener in his own particular situation,” Benjamin wrote, “it reactivates the object reproduced.”<sup>190</sup> In Benjamin’s view, meaning is no longer absolute. Rather, the work of art is given meaning within the context of the situation in which it is being observed.

To Benjamin, the transition from traditional production to mechanical reproduction constitutes a complete transformation of the work of art. When the question of “authenticity” ceases to be applicable to the work of art, Benjamin wrote, the “total function of art is reversed.” He continued: “Instead of being based on ritual, it begins to be based on another practice—politics.”<sup>191</sup> Based on this understanding of the political function of the mechanically reproduced work of art, Benjamin offered two conceivable — but conflicting — ways to understand it.

The first take on this encounter between art and its audience is that meaning is presented to the onlooker. This obviously raises the question of *who* is presenting meaning, but it is irrelevant to my use of the dichotomy whether this is done by an authoritarian regime or some sort of Gramscian cultural hegemony. Suffice it to say, that someone or some social structure, whichever it is, endeavors to reduce the uncertainty about the meaning of a work of art through guiding the beholder. Thus, the work of art is *consumed*. One example of this is captions to photographs, which soon after the invention of photography became obligatory in illustrated magazines. Even more explicit guidance can be seen in film, where “the meaning of each single picture appears to be prescribed by the sequence of all preceding ones.”<sup>192</sup> In this view, the ancient lament “that the masses seek distraction whereas art demands concentration from the spectator” is true. Art is something that happened to the spectator, it “hit [him] like a bullet.” Benjamin illustrates this view with a quote by Duhamel, who calls the movie “a pastime for helots, a diversion for uneducated, wretched, worn-out creatures who are consumed by their worries, a spectacle which requires no concentration and presupposes no intelligence [...].”<sup>193</sup>

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<sup>189</sup>Ibid., p. 221.

<sup>190</sup>Ibid., p. 221.

<sup>191</sup>Ibid., p. 224.

<sup>192</sup>Ibid., p. 226.

<sup>193</sup>Duhamel in *ibid.*, p. 231.

The second take on the encounter between art and its audience is that meaning can be created by the onlooker — the onlooker *participates*. In this view, the distracted mass is not hit like a bullet. Rather, the distracted mass “absorbs the work of art.” The onlooker is an active participant — she is, as I will get back to in Part IV, a “tinkerer.” Benjamin illustrated this participation through a comparison with architecture. After seeing the building, you *enter* it. Buildings are both perceived *and* used. It is not apparent, however, how this comparison illuminates participation. One cannot “enter” a picture or a movie in the same way as one enters a building, nor “participate” in a building. Nevertheless, a likely interpretation is that the *meaning* of a building is created through its use. The use of the building is therefore a source to its meaning. In the same way, Benjamin argued, it is the “use” of non-architectural art which is the source to its meaning.

The participation Benjamin wrote about was an “interpretive participation,” however. It is similar to the kind of participation inherent in Julie Cohen’s description of how the open internet “enables the creation of meaning [...] Not bits, not abstract, disembodied information that has independent properties of flow, but meaning.”<sup>194</sup> Benjamin has been criticised for implying that the audience “participate” even when they sit silently in a dark movie theater, but if interpretation is also participation it is certainly possible to argue that even the moviegoer participates in the creation of meaning.

Another kind of participation is a “generative participation,” in which to participate is to be a part of the production itself. To Benjamin the abundance of opportunities to publish was the core of generative participation: “At any moment the reader is ready to turn into a writer.”<sup>195</sup>

## Participation in the Networked Age

It is the basic insight of the difference between consumption and participation, as well as the ensuing analysis of interpretive and generative participation, which has been used in the public domain debate. The participants in this debate have not really written about mechanical reproduction, however. Rather, they have written about the work of art in what could perhaps be called an “age of unlimited duplication.” Sunder: “The Age of Mechanical Reproduction is yielding to the Age of Electronic Participation.”<sup>196</sup> Benkler therefore argued that Benjamin

<sup>194</sup> Julie E. Cohen, “Network Stories”, *Law and Contemporary Problems* 70, 2007, p. 93.

<sup>195</sup> Benjamin, “The Work of Art in the Age of Mechanical Reproduction”, p. 232.

<sup>196</sup> Madhavi Sunder, “IP3”, *Stanford Law Review* 59, 2006, p. 306.



overlooked the barriers that were erected through the introduction of mechanical reproduction: “The barrier of production costs, production values, and the star system that came along with them, replaced the iconic role of the unique work of art with new, but equally high barriers to participation in making culture.”<sup>197</sup> In Benkler’s view, the insights derived from Benjamin’s article were not necessarily true in the age of mechanical reproduction, but they are becoming increasingly correct as the capabilities provided by digital media have begun to grind down these barriers.

Until now, all I have written about Benjamin and the use of his analysis within the public domain discourse has been equally true for aesthetics and politics. As I mentioned in the first chapter of Part III, however, I am going to write about the participatory aesthetic, which certainly also builds on Benjamin’s analysis of participation, in Part IV. My focus here is the use of Benjamin to analyse the value of the public domain in a political context.

In his 2006 book “The Wealth of Networks,” Benkler argued that Benjamin’s essay is “one of the only instances of critical theory that took an optimistic view of the emergence of popular culture in the twentieth century as a potentially liberating turn.”<sup>198</sup> This optimism has certainly been sustained through some of these contributions within the modern debate on the public domain. One example is the Cohen quote from above, where what she called “the open Internet” enables “the creation of meaning.”<sup>199</sup> This is similar to Benjamin’s interpretive participation, even though it is not clear how internet changed the possibilities to participate in the creation of meaning. Generative participation has certainly been facilitated by the technological innovations in the last decades of the twentieth century, but it was not generative participation Sunder wrote about when she argued that we were approaching the “Age of Electronic Participation.” One possible interpretation is that the increase in generative participation has prompted a rich profusion of new works of art, and, moreover, that this cornucopia of meaning has revealed the traditional sources of meaning and sparked increased participation in interpretation, i.e. the creation of meaning. Sunder: “Revealing the multivocality of the text invites the question of what other worlds exist and are possible.”<sup>200</sup> The basic properties of this new situation is illustrated well in a quote from Andrew Keen’s dystopian 2007 book “The Cult of the Amateur,” although he did not share the optimism: “With more and more of the information

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<sup>197</sup>Benkler, *The Wealth of Networks*, p. 296.

<sup>198</sup>Ibid., p. 296.

<sup>199</sup>Cohen, “Network Stories”, p. 93.

<sup>200</sup>Sunder, “IP3”, p. 306.

online unedited, unverified, and unsubstantiated, we will have no choice but to read everything with a sceptical eye.”<sup>201</sup>

It is not evident that the age of unlimited duplication is different in *kind* to the age of mechanical reproduction. After all, Benjamin also wrote about both interpretive and generative participation. It is therefore possible to argue that the “Age of Electronic Participation” is only different in *degree* to the age of mechanical reproduction. To Benkler, however, even if the change is only a change in degree, it is significant enough to be seen as revolutionary:

We are in the midst of a quite basic transformation in how we perceive the world around us, and how we act, alone and in concert with others, to shape our own understanding of the world we occupy and that of others with whom we share it.<sup>202</sup>

## A Reconstructed Public Sphere

Just like the anthropological study of gift exchange and the economic study of the nature of the firm have rich traditions from which the participants in the public domain debate has tried to poach certain concepts and notions, there exists a rich tradition in political science studying the role and nature of the “public sphere” in a democracy. The most influential analysis within this tradition is, arguably, Jürgen Habermas’ 1962 study “The Structural Transformation of the Public Sphere.”

To Habermas, the “bourgeois public sphere may be conceived above all as the sphere of private people come together as a public.”<sup>203</sup> In a general sense, it is therefore similar to what I labelled the Mickunian public domain in the beginning of this chapter, which is, in short, a political sphere in which autonomous and equal persons meet and discuss the laws that govern their lives. To Mickunas, the principles of a democratic political society “require that the sole sources of rules is the public covenant.”<sup>204</sup> To a certain degree, the argument is similar to Raymond’s argument on the value of more people participating in peer production. The more people participating in the political process, the better the outcome will be. It can therefore be argued that the epigram “Given enough

<sup>201</sup> Andrew Keen, *The Cult of the Amateur*, (New York: Doubleday/Currency, 2007), p. 46.

<sup>202</sup> Benkler, *The Wealth of Networks*, p. 472.

<sup>203</sup> Jürgen Habermas, *The Structural Transformation of the Public Sphere*, (Cambridge: Polity Press, 1989), p. 27.

<sup>204</sup> Mickunas, “The Public Domain”, p. 181.

eyeballs, all bugs are shallow” is just as essential in a political context as in an economic context.

In Mickunas’ uncompromising style, this means that a society in which every person is not an autonomous participant, is not a democracy. The aristocratic argument that “no progress could be achieved if decisions were left to the multitude of individual whims”<sup>205</sup> did not bite on Mickunas. In a situation where the individual is not independent, Mickunas argued, “one should speak of power confrontations and not politics.”<sup>206</sup> Similarly, Habermas argued that “the public sphere of civil society stood or fell with the principle of universal access. A public sphere from which specific groups would be *eo ipso* excluded was less than merely incomplete; it was not a public sphere at all.”<sup>207</sup>

According to Debora Halbert, such a public sphere is connected to the Langean public domain, but coming from an intellectual property law discourse the Langean public domain has not “explicitly been linked to the larger theory of the public sphere.”<sup>208</sup> On the other hand, Halbert continues, the public domain has not been a subject in public sphere theories either. Instead, “public sphere theories tends to take the circulation of ideas as a given.”<sup>209</sup>

The general trend within the public sphere-tradition is more pessimistic than the optimism I argued can be found within the public domain debate and Benkler argued can be found in Benjamin. To Habermas, for example, the public sphere was more or less extinct. It was a condition for the creation of a kind of society that subsequently destroyed it. Habermas: “With the help of [the principle of the public sphere], which according to its own idea was opposed to all domination, a political order was founded whose social basis did not make domination superfluous after all.”<sup>210</sup> In the words of Eva Hemmungs Wirtén, the technological innovations of the twentieth century was seen as “damaging and destructive, [...] incapable of empowering the passive consumer.”<sup>211</sup> It might therefore seem to be contradictory that theories on the public sphere have been used to give substance to an optimistic analysis of the public domain. Some of the pessimism “pulled through” into the public domain debate, however. In his 2001 book “Copyrights and Copywrongs,” Siva Vaidhyanathan argued that the structural transformation of the public sphere during the nineteenth and twentieth centuries, which

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<sup>205</sup>Ibid., p. 179.

<sup>206</sup>Ibid., p. 182.

<sup>207</sup>Habermas, *The Structural Transformation of the Public Sphere*, p. 85.

<sup>208</sup>Halbert, *Resisting Intellectual Property*, p. 16.

<sup>209</sup>Ibid., p. 16.

<sup>210</sup>Habermas, *The Structural Transformation of the Public Sphere*, p. 88.

<sup>211</sup>Wirtén, *Terms of Use - Negotiating the Jungle of the Intellectual Commons*, p. 35.

was the subject for Habermas' study, coincide with the transformation of copyright: "A cycle has developed. The corruptions of copyright have enforced, and been enforced by, the erosions of the public sphere."<sup>212</sup> Throughout the last half of the twentieth century, Vaidhyanathan wrote, public opinion has been marked by "steady centralization and corporization of information and access."<sup>213</sup>

Over the six years between 2001 and 2007, this rather gloomy outlook turned into a more optimistic one. In his 2007 article "The Anarchist in the Coffee House," Vaidhyanathan analyses the Free Culture Movement, which he claims has the potential to "deploy, leverage, and spread liberal values into spaces that have been overrun by a proprietary ideology."<sup>214</sup> As such, "[t]he Free Culture Movement is Habermasian."<sup>215</sup>

A more detailed discussion of the relationship between the public domain and the public sphere can be found in Debora J. Halbert's 2005 book "Resisting Intellectual Property," where she wrote that "a viable public sphere only exists when a vibrant public domain exists."<sup>216</sup> Halbert is also the one to have embedded the Mickunian public domain into the public domain discourse. To Halbert, a strong public domain is a prerequisite of a public sphere. "People draw from culture generally," Halbert wrote, "to create their understanding of the world and to communicate with others." Halbert:

As people interact with each other using shared cultural images they begin to form publics, a process that we can only hope will help to solidify democracy. Democracy is built upon shared publics and shared culture; the public sphere must not be understood as only the exchange of political information, but instead the development of cultural connections.<sup>217</sup>

This is similar to the theory of participation that was extracted from Benjamin, but it also incorporates a view on the space in which the encounter between the work of art and its audience takes place. Thus, the public sphere can, at least to a certain degree, be said to be the location of the encounter between the work of art and its audience, but only if the encounter is participatory. As the basic argument has been that "autonomous freedom implies a life under freely posited, debated, and rationally examined rules,"<sup>218</sup> a consumptive encounter

<sup>212</sup>Siva Vaidhyanathan, *Copyright and Copywrongs*, (New York: New York University Press, 2001), p. 6.

<sup>213</sup>*Ibid.*, p. 7.

<sup>214</sup>Siva Vaidhyanathan, "The Anarchist in the Coffee House", *Law and Contemporary Problems* 70, 2007, p. 207.

<sup>215</sup>*Ibid.*, p. 207.

<sup>216</sup>Halbert, *Resisting Intellectual Property*, p. 16.

<sup>217</sup>*Ibid.*, p. 26.

<sup>218</sup>Mickunas, "The Public Domain", p. 181.

between the work of art and its audience, in which the meaning is presented to the audience, does not qualify as a Mickunian public domain.

What is seen as a corruption of the participatory encounter into a consumptive encounter, then, is the background for Halbert's acknowledgement of the fact that the idea of a public sphere can just as well be used to "serve the purposes of a powerful elite." As a result of this, "a conceptual battle to gain control over the idea of the public sphere must be fought."<sup>219</sup>

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<sup>219</sup>Halbert, *Resisting Intellectual Property*, p. 25.

## Part IV

# REALISATION

## Appreciating Tinkering

The fourth part of my thesis is about the realisation of the potential created through deconstruction and anchoring. What I mean by this is that the fragments left in the wake of the deconstructive phase of the debate were combined with the “new” concepts and theories from the anchoring phase to form what in the mid-2000s can be said to have reached a level of complexity that can be described as a comprehensive *social theory* on the public domain. On top of this descriptive social theory, moreover, a normative politics on free culture and immaterial rights was put together. This “realisation” is a theoretical reconstruction of words and conceptions used within the intellectual property discourse, as well as in the context of information and knowledge in general, aimed at consolidating a social theory on the nature and role of the public domain. Inasmuch as this process included poaching a number of insights from other theories and discourses to extend the analytic sophistication and credibility of the theories on the public domain, the debate was detached from the realm of law, and new arguments were developed conforming to the structure of other frames of references, e.g., aesthetics, economics, and politics.

Consequently, the fourth phase of the public domain debate did not only encompass a negative argument about how the public domain should be, in Lange’s words, recognised as a “field of individual rights fully as important as any of the new property rights.”<sup>220</sup> In addition to this, namely, it encompassed a positive argument about the need to protect and strengthen the public domain. Indeed, the normative argument went from “resistance” to “advocacy.” In the first and second phase of the debate, the normative arguments were usually posited as criticism of excessive intellectual property rights. In the fourth phase, however, the typical normative argument did not necessarily mention intellectual property at all. Rather, the object of the argument was the public domain itself, which was

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<sup>220</sup>Lange, “Recognizing the Public Domain”, p. 178.

endorsed for nothing less than being essential to the constitution of the society in which we live.

As mentioned, the two last phases of the debate are not as clear-cut as the first two phases. Actually, it could be argued that they are both a part of a “reconstructive phase.” I have chosen to separate the two, however, because anchoring and realisation are two distinct schemes, and because it makes the exposition of the public domain debate more intelligible. In the following I am therefore going to write about arguments and analyses that have already been described in Part III, but in this part I will write about them in the context of a realisation of these insights as parts of a comprehensive social theory of public domain.

I will begin my description of the fourth phase of the debate with a discussion about how the public domain discourse was detached from a jurisprudential frame of reference in the context of James Boyle’s notion of “cultural environmentalism.” Then I will turn to how the argument on the public domain was detached from a utilitarian discourse, especially in the context of the analysis delineated in Lange’s 2001 article “Reimagining the Public Domain,” before I end with a discussion on the argument that the public domain is constitutive of society itself.

## The Grazing Land of the Apprentice

According to Boyle in his 1997 article “A Politics of Intellectual Property — Environmentalism for the Net?”, the environment and the public domain have a lot in common. Both the environment and the public domain are fragile, they are endangered, and their market value tend to be lower than their value to society. Boyle therefore compared the few and rather narrow normative arguments in favour of the public domain at the time of writing the article with the beginning of the environmental movement in the 1950s and 1960s,<sup>221</sup> and called for an

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<sup>221</sup>James Boyle, “A Politics of Intellectual Property - Environmentalism for the Net?”, *Duke Law Journal* 47, 1997, p. 108.

immaterial double to the preservationist movement of the physical environment — a “cultural environmentalism.”<sup>222</sup>

Just like in the context of the natural environment, in which supporters of the park system, hunters, and birdwatchers are groups of people who care about issues similar enough for them to join forces, both start-up software engineers, libraries, appropriationist artists, parodists, biographers, and biotech researchers care, according to Boyle, about issues that shares enough features to be labelled cultural environmentalism issues. In 1997, however, they had not realised this common interest yet because the movement for the preservation of the public domain lacked a theoretical framework for such a “perception of common interest among disparate groups.”<sup>223</sup> To Boyle, there was a theoretical gap in the preservationist movement of the cultural environment.

Based, mostly, on the critique of the romantic notion of authorship, the preservationist movement of the cultural environment already had something resembling the ecological analysis of the fragile relationship between organisms and their physical surroundings. At the same time, it can be argued that an economic analysis was already present. At least partially, Grossman and Stiglitz’ analysis of the impossibility of informationally efficient markets and the ensuing tradition of information economics can be seen as an economic justification for the public domain. Moreover, insights from welfare economics can, to a certain degree, also be applied to an analysis of the immaterial environment. After all, it was the combination of the ecological analysis of the fragility of the environment with the disclosure of the manner in which welfare economics revealed ways “markets can fail to make economic actors internalize the full costs of their actions”<sup>224</sup> that showed how the prevailing economic and legal system systematically emphasised private property at the expense of the surrounding environment. Boyle: “Markets would *routinely* fail to make economic actors internalize their own costs, particularly their own environmental costs. This failure would *routinely* disrupt or destroy fragile ecological systems, with unpredictable, ugly, dangerous, and possibly irreparable consequences.”<sup>225</sup> This could just as well have been a description of the cultural environment.

From the fact that there existed no preservationist movement for the public domain in 1997 it is clear that the theoretical framework was not substantial enough,

<sup>222</sup>Actually, he did not introduce the expression “cultural environmentalism” in 1997. Rather, the label was later used as a name for the concept he described as a “politics of intellectual property” and an “environmentalism for the net.”

<sup>223</sup>Boyle, “A Politics of Intellectual Property - Environmentalism for the Net?”, p. 108.

<sup>224</sup>Ibid., p. 109.

<sup>225</sup>Ibid., p. 109.



as Boyle argued. Either that, or the only explanation would be that Boyle's analysis was wrong. After all, Boyle overlooked the lack of a "Silent Spring" in the context of the cultural environment, meaning a damascene event that transforms the public opinion. I am not only talking about Rachel Carson's influential 1962 essay and book "Silent Spring," but the actual silence that was experienced by people in general because birds did die.

## A Politics of Intellectual Property

When Boyle wrote that "we have no politics of intellectual property in the way that we have a politics of the environment"<sup>226</sup> in 1997, he displayed a bias toward an intellectual property discourse. The debate thus seemed to have stalled within a jurisprudential frame of reference. After all, he called for a politics of *intellectual property*, not a politics of the public domain or the cultural environment.

As mentioned in Part II, this bias was typical for both the first and second phase of the public domain debate. Both Lange, Litman, and Boyle — in his 1992 article "A Theory of Law and Information" — studied the public domain within the context of copyright and patent law. Hettinger, on the other hand, did argue within a philosophical and moral frame of reference, but intellectual property law still had a paramount role in his argument.

In light of Boyle's book "Shamans, Software, and Spleens," however, it is still surprising that he used the words "a politics of intellectual property" as late as 1997. After all, "Shamans" was written in 1996, and in it, Boyle argued clearly and positively in favour of a strong public domain in a more comprehensive way than what had been done before him. The basic argument was still similar to Litman's argument that the public domain should be seen "as a device that permits the rest of the system to work by leaving the raw material of authorship available for authors to use,"<sup>227</sup> but in addition to this, he did two things: (1) He discussed both utilitarian, economic, aesthetic, and moral approaches toward the public domain; and (2) he continued Hettinger's incorporation of patent law, although he also wrote about the public domain in connection with other information issues like blackmail and insider trading.

Even so, the negative, intellectual property-focused approach can still be identified. Instead of arguing that the public domain is necessary for the creation of new knowledge and information — without mentioning intellectual property at

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<sup>226</sup>Ibid., p. 89.

<sup>227</sup>Litman, "The Public Domain", p. 968.

all — Boyle questioned the fairness of intellectual property. To justify intellectual property, Boyle argued, it is necessary “to give a moral justification of the fact that the individual is being granted a private monopoly rent for recombining language, genre, and ideas that were harvested free of charge from the public domain.”<sup>228</sup> This argument is clearly different from the earlier arguments in that he questioned the justification of intellectual property rather than criticise copyright law as a threat to the public domain. Nevertheless, his focus was still intellectual property.

## Utilitarianism with an Economic Yardstick

The typical argument in place when Boyle introduced the notion of a preservationist movement of the cultural environment, namely that the public domain is, using Hyde’s words, “a grazing land of the apprentice,” is perhaps best described as utilitarian. This is unsurprising, as one of the most important justifications of intellectual property is also utilitarian. This utilitarianism is, in a sense, economic. By this I do not mean that they employ economic models to calculate the answer, but that they measure the effectiveness in economic terms. As such, it is a utilitarianism with an economic yardstick.

Arguably, at least some of the reason for the widespread application of utilitarian arguments in this period can be found in the predominance of marketisation in the 1980s and 1990s. The only argument that seemed to stick was the argument on economic efficiency. It is hard to appraise “culture,” however, and the argument was readily reduced to a simplistic “more.” The core of the argument was therefore that the public domain is needed because it makes it possible to create “more.” As a simplified argument on economic efficiency the aim to create “more” is mostly unspecified, but it is similar to the aim of a general usefulness to society which is the core of the Copyright Clause in the American constitution, namely “to promote the Progress of Science and useful Arts.”<sup>229</sup> Jack Valenti’s argument about the public domain work being an orphan belongs to such a utilitarian discourse:

A public domain work is an orphan. No one is responsible for its life. But everyone exploits its use, until that time certain when it becomes soiled and haggard, barren of its previous virtues. Who, then, will invest the funds to renovate and nourish its future life when no one owns it?<sup>230</sup>

<sup>228</sup>Boyle, *Shamans, Software, and Spleens*, p. 97.

<sup>229</sup>*The Constitution of the United States*, Article 1, Section 8, Clause 8.

<sup>230</sup>Jack Valenti in Ochoa, “Origins and Meanings of the Public Domain”, p. 256.

Similar to the negative view of the public domain as something works “fall” into from the eighteenth, nineteenth and early twentieth centuries, Valenti paints a picture of the public domain as what could perhaps be called a “Grim Reaper of culture.” Counter to the view of people like Lange, Litman, and Boyle, Valenti claims that public domain reduce the “amount” of culture, because no one is “responsible for its life.”

A critique of the notions inherent in this “Grim Reaper Narrative” can be found in Drahos’ 1996 book “A Philosophy of Intellectual Property.” To Drahos, an extension of intellectual property may “provide individuals with strong incentives to act in non-preservationist ways when it comes to the intellectual commons,” and, moreover, to “to appropriate the commons or prevent abstract objects from making it into the commons.” This may cause “a reversal of the economist’s common pool problem” to take place.<sup>231</sup> To Drahos, the public domain may end up as “a hunting ground for the economically strong and the technologically capable.”<sup>232</sup> This argument belongs to the same utilitarian framework of reference.

Benkler’s analysis of commons-based peer production, which I described in Part III, is similar to this utilitarian argument, but broader and more extensive. Indeed, in his 2007 “follow-up” article on the preservationist movement, “Cultural Environmentalism and Beyond,” Boyle described Benkler’s 2006 “Wealth of Networks” as the beginnings of “a more sophisticated normative, economic, and anthropological notion of commons-based production.”<sup>233</sup> Even though Benkler’s analysis was clearly more comprehensive than earlier analyses, however, it was still mainly utilitarian. A more pronounced political argument can be found in Lange’s analysis of the public domain as a state, not a location, which I turn to now.

## Citizenship of the Creative Imagination

In 1968, Benjamin Kaplan wrote that “I reflected that if a man has any ‘natural’ rights, not the least must be a right to imitate his fellows, and thus to reap where he has not sown.”<sup>234</sup> This “right” has been present throughout the entire modern debate on the public domain, if not as explicit all the time. As discussed in Part I, Lange picked up this rights-based approach in his 1981 article “Recognizing the

<sup>231</sup>Drahos, *A Philosophy of Intellectual Property*, p. 67.

<sup>232</sup>*Ibid.*, p. 67.

<sup>233</sup>James Boyle, “Cultural Environmentalism and Beyond”, *Law and Contemporary Problems* 70, 2007, p. 21.

<sup>234</sup>Kaplan, “An Unhurried View of Copyright”, p. 2.

Public Domain.” It was revisited, however, in Lange’s 2001 article “Reimagining the Public Domain.” In it, Lange introduced the notion of a “citizenship of the creative imagination.”

In connection with the Duke Conference on the Public Domain in 2001, Lange wrote an update of his 1981 article “Recognizing the Public Domain.” In the 2001 article “Reimagining the Public Domain,” Lange first adorned the established critique of the negative understanding of the public domain through an analogy with an African veldt. “Imagine an African veldt,” Lange wrote, “where lions and jackals and gazelles dwell in uneasy symbiosis while the merciless sun shines down dispassionately upon them.”<sup>235</sup> The veldt is a metaphor for all the information and knowledge that exists, and the animals on the veldt — or the different kinds of information and knowledge — lives in a symbiosis. Nevertheless, Lange argued, it does not require much imagination to recognise these inhabitants of the veldt as separate species. Avoiding such a recognition is a sort of taxonomical cowardliness: “You have to be a lion- or jackal-lover of truly limited imagination or unlimited commitment to argue that gazelles are to be understood as no more than whatever is left over after their adversaries have finished feeding.”<sup>236</sup>

We recognise much of this argument in Litman’s and Boyle’s writings, and so it is unsurprising that Lange closes this introduction by asserting that his project is “to recognize gazelles as gazelles—and not merely to recognize them, but to give them the means with which to defend themselves against their natural enemies.”<sup>237</sup> What he did was to suggest a conceptual change in our understanding of what the public domain is. Rather than being a place (“a wilderness, a commons, a sanctuary, a home”), Lange argued that the public domain should be conceived as status. This status is similar to citizenship, but, Lange wrote, “a ‘citizenship’ arising from the exercise of creative imagination rather than as a concomitant of birth,”<sup>238</sup> i.e. “a citizenship of the creative imagination.” Lange:

Imagine the public domain as a status that arises from the exercise of the creative imagination, thus to confer entitlements, privileges and immunities in the service of that exercise; a status independently and affirmatively recognized in law, sometimes collective in nature and sometimes individual, but omnipresent, portable and defining; and a status meanwhile paramount to whatever inconsistent status may be conferred upon a work of authorship (or its author) from time to time, whether that work is protected as intellec-

<sup>235</sup>David Lange, “Reimagining the Public Domain”, *Law and Contemporary Problems* 66, 2003, pp. 473-474.

<sup>236</sup>*Ibid.*, p. 474.

<sup>237</sup>*Ibid.*, p. 474.

<sup>238</sup>*Ibid.*, p. 475.

tual property, or is included within a so-called liability regime, or is otherwise provided for.<sup>239</sup>

Even though Lange begins his article with a discussion on the traditional take on the public domain, his analysis is different from the utilitarian approach. To Lange, the public domain is valuable for more than its ability to insure production, and his argument goes beyond a mere conservation of the public domain to a recognition of the rights everyone have in this cultural commons. Moreover, this recognition of the rights of everyone signal the aesthetic expansion of art into something we all participate in. Lange did not only refer to the necessity of making sure that artists have access to the public domain as raw material. Rather, he advocates everyone's rights in the public domain both for political and aesthetic reasons. It is this political and aesthetic analysis I turn to now.

## Thespian Reality

In 1996, Peter Drahos wrote that “decisions about who is to have rights of access and use of the intellectual commons are decisions that are *constitutive of community* (My italics).”<sup>240</sup> Contrary to the first phase of the public domain debate, in which the public domain was discussed almost exclusively within a jurisprudential frame of reference, Drahos’ claim that decisions regarding intellectual commons are “constitutive of community” places the public domain in a much larger context. Even though Boyle briefly touched upon this as early as in 1992 when he wrote that “it is hard to repress an occasional wish to frame the issue as whether a specific type of regulation will help or hinder the kind of society that we wish to create,”<sup>241</sup> Drahos’ book was an early instance of such a constitutive approach. It was not until the 2000s equally comprehensive studies of the role of the public domain became common.

The notion that something is constitutive of society itself is certainly not unique to the public domain discourse. One example is the argument that the introduction of wristwatches and pocket watches influenced the society in a fundamental

<sup>239</sup>Ibid., p. 474.

<sup>240</sup>Drahos, *A Philosophy of Intellectual Property*, p. 59.

<sup>241</sup>Boyle, “A Theory of Law and Information”, p. 1525.

manner. Another example is the argument that cell phones and ceaseless connectivity has altered the makeup of human association. This form of societal adaptation is also comparable to Karl Polanyi's analysis of the transformation of traditional society into a market society. To Polanyi, a market organisation of the economic system will by necessity bring about a market society. The economy is not embedded in social relations. Rather, "social relations are embedded in the economic system." The economic system is superior to social relations:

Once the economic system is organized in separate institutions, [...] society must be shaped in such a manner as to allow that system to function according to its laws. This is the meaning of the familiar assertion that a market economy can function only in a market society.<sup>242</sup>

A market organisation is therefore "contagious" or "viral" in that it expands by reorganising other parts of society based on its own structure. A similar notion of the contagiousness, and, hence, superiority, of such "low-level principles" can be found in Lawrence Lessig's 2004 book "Free Culture." To Lessig, a free culture "supports and protects creators and innovators."<sup>243</sup> The opposite of such a free culture is a "permission culture," in which you must get permission before you can create. According to Lessig, intellectual property law has operated as such a superior low-level principle in transforming the culture into a permission culture. This argument is comparable to Vaidhyanathan's argument about the correspondence between the collapse of the Habermasian public sphere and the development of copyright, which I discussed toward the end of Part III. Vaidhyanathan did not argue that the collapse of the Habermasian public sphere was brought about by expansions of copyright alone. Rather, he argued that the corruptions of copyright "have enforced, and been enforced by," the disintegration of the public sphere.<sup>244</sup>

In line with this, Halbert argued that "the public sphere of the eighteenth century was possible because the circulation of texts remained relatively free from copyright."<sup>245</sup> It is therefore likely that Halbert would agree to Lessig's argument that "freedom from copyright," which can be interpreted as the presence of a strong public domain, can also act as a contagious and superior low-level principle. But this principle, the argument goes, transforms the culture into a free culture.

A free culture cannot be legislated, however, or intentionally decided in any other way. Law can only *enable* the creation of a free culture, not actually create it.

<sup>242</sup>Karl Polanyi, *The Great Transformation*, (Boston: Beacon Press, 2001 (1944)), p. 60.

<sup>243</sup>Lessig, *Free Culture*, p. xiv.

<sup>244</sup>Vaidhyanathan, *Copyright and Copywrongs*, p. 6.

<sup>245</sup>Halbert, *Resisting Intellectual Property*, p. 23.

The public domain is therefore not unconditionally a superior low-level principle, which Vaidhyanathan recognised when he wrote “have enforced, and been enforced by.” Moreover, a view of the public domain as an enabler is similar to the notion underlying Mickunas’ argument about founding a democratic community, which “is not an activity of the past, done once and for all by the so-called founders but must be constantly maintained by every citizen.”<sup>246</sup> The argument is therefore put forward that being a participant in a free culture rather than a spectator in a permission culture not only influences one’s experience of culture, but affect the society itself.

If participation potentially changes the culture itself, human beings must have the capacity to alter the society in which we live. At the same time, the constitution of our culture must have the capacity to shape our lives. This is the reason people like Lethem, Benkler, and Boyle focus so much on the process of deconstruction. In his 2007 essay “Ecstasy of Influence,” for instance, Lethem argued that the participation of the observer promotes the process of revealing or uncovering what was ultimately described better with words written by Boyle, despite the fact that Boyle did not write them about participation, namely “that which is suppressed or rendered invisible by the overwhelming familiarity of our social arrangements.”<sup>247</sup>

Benkler acknowledged this reciprocity of our power to change our culture and our culture’s power to change us in more detail when he wrote (1) that “culture operates as a set of background assumptions and common knowledge that structure our understanding of the state of the world and the range of possible actions and outcomes open to us individually and collectively,”<sup>248</sup> and (2) that “culture is manipulable, manageable,” and that there seems to exist “a direct locus of intentional action aimed precisely at harnessing its force as a way of controlling the lives of those who inhabit it.”<sup>249</sup>

This analysis of free culture, based on the superiority of contagious low-level principles, participation, and the influence of the culture we create, is the philosophical foundation for the comprehensive social theory on the public domain I will write about in the last part of this chapter. Because this was still very much a work in progress in 2007, my description of this theory can only be a rough sketch. I have also chosen to restrict my account to Lessig, Benkler, and Lethem, although I have included a few references to an earlier article on infor-

<sup>246</sup>Mickunas, “The Public Domain”, p. 179.

<sup>247</sup>Boyle, “A Theory of Law and Information”, p. 1423.

<sup>248</sup>Benkler, *The Wealth of Networks*, p. 297.

<sup>249</sup>*Ibid.*, p. 298.

mation in the digital age by John Perry Barlow and a book on “public domain” in the context of the theater by Richard Schechner. I turn to this now.

“Tinkering,” in its original sense, is to try to repair or improve something, mostly something mechanical, and more often than not with no useful effect. Starting from the early 2000s, however, the word was used to denote playing around in a more general sense, especially on computers. The computer scientist Ed Felten spoke about a “Freedom to Tinker,” because tinkering, in his opinion, is an important aspect of technology and understanding in general. He even called for a constitutional right to tinker. On Felten’s blog “Freedom to Tinker,” the expression is defined as “your freedom to understand, discuss, repair, and modify the technological devices you own.”<sup>250</sup>

A freedom to tinker is essential to commons-based peer production. If “every good work of software starts by scratching a developer’s personal itch,”<sup>251</sup> as Raymond put it, no good software will ever be created without freedom to tinker. This is also important outside of software. In fact, it is the essence of incremental innovation. The idea that the worker should be able to see and implement small improvements in the production process depends upon the worker’s freedom to play around. If every gadget, instrument, and machine was equipped with seals of which breaking not only voids the guarantee but also infringe upon someone’s intellectual property rights, this tinkering is impossible without breaking the law. Both of these kinds of tinkering are examples of what I have called generative participation, and they are both based on the belief that more people will find better solutions, or, as Raymond put it: “Given enough eyeballs, all bugs are shallow.”<sup>252</sup>

A similar kind of tinkering can be seen in Lessig’s argument about the educational value of playing around. Lessig’s example is a school project consisting of buses filled up with video equipment which “enable [...] children to learn something about media by doing something with media. By doing, they think. By tinkering, they learn.”<sup>253</sup> YouTube is another example. Through YouTube, people are allowed to play around with media images on their own. By tinkering, they become “media literate.” To Lessig, it is important for children to understanding the “grammar” of media: “For just as there is a grammar for the written word, so, too, is there one for media. And just as kids learn how to write by writing lots of terrible prose, kids learn how to write media by constructing lots of (at least at

<sup>250</sup> *Freedom to Tinker*. <http://www.freedom-to-tinker.com> (February 19, 2009)

<sup>251</sup> Raymond, “The Cathedral and the Bazaar”.

<sup>252</sup> *Ibid.*

<sup>253</sup> Lessig, *Free Culture*, p. 35.



first) terrible media.”<sup>254</sup> Consequently, if all kinds of media are off limits, and it is illegal to “rip, mix, burn,” tinkering is, again, impossible without breaking the law.

Tinkering, its connotations notwithstanding, is therefore comparable to participation. But tinkering is not only important with respect to technology and media. It is important for every aspect of a self-conscious culture. This kind of tinkering is only possible, however, if the content of culture is available. Based on an appreciation of tinkering an argument on the value of the public domain is therefore put forth. For, as Lessig wrote, “the law and, increasingly, technology, interfere with a freedom that technology, and curiosity, would otherwise ensure.”<sup>255</sup> The argument is, as I wrote in the introduction, that we are at a loss as a society without the right to imitate, plagiarise, criticise and satirise. Lethem used Steve Erickson’s words and wrote: “We’re surrounded by signs; our imperative is to ignore none of them.”<sup>256</sup> The public domain is the core of this analysis. It is impossible to imitate and criticise, it is argued, if it is illegal to reuse.

Up until this point, most of that which had been said about the public domain had been general, and not dependent on the development of the internet. Certainly, internet had influenced the analyses, and perhaps even caused the analyses to be made. But the recognition of creativity as derivative and the argument that “the only way to make gray is to mix black and white,”<sup>257</sup> was posited irrespective of the existence of digitisation. An argument in favour of a strong public domain has also been made, however, based on the role of the public domain in a digital era. The rest of this chapter is about this argument

“Popular music did not begin with Elvis,” Benkler wrote. “There has always been a folk culture—of music, storytelling, and theater.”<sup>258</sup> But this culture was not “static” in the way modern culture is. “An oral tradition quite naturally takes its shape from the changing culture which transmits it,” Schechner wrote, “a written tradition, however, trends to solidify and become reactionary.”<sup>259</sup> There was no “final cut” in the ancient human societies. Barlow:

Because there was never a moment when the story was frozen in print, the so-called ‘moral’ right of storytellers to own the tale was neither protected

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<sup>254</sup>Ibid., p. 36.

<sup>255</sup>Ibid., p. 47.

<sup>256</sup>Lethem, “The ecstasy of influence - A plagiarism”, p. 63.

<sup>257</sup>Sunder, “IP3”, p. 306.

<sup>258</sup>Benkler, *The Wealth of Networks*, p. 295.

<sup>259</sup>Richard Schechner, *Public Domain*, (Indianapolis: The Bobbs-Merrill Company, 1969), p. 227.

nor recognized. The story simply passed through each of them on its way to the next, where it would assume a different form.<sup>260</sup>

To Barlow, this role of information corresponded to the nature of information. “Information wants to be free,” Barlow wrote. It “is the pitch, not the baseball, the dance, not the dancer.”<sup>261</sup> Intellectual property rights must therefore be seen in light of the development of “containers.” It is unsurprising, then, that copyright was introduced shortly after the main “container” — the book — was invented. It was unimaginable before.

Digitisation was certainly novel, but at the same time, it is argued, digitisation recreated something that had been lost. With the internet and digital media, Barlow argued, our culture was returning to the continuous information flow of the traditional society. Just as in an “oral tradition, digitized information has no ‘final cut.’”<sup>262</sup> Barlow continued: “The stories which once shaped our sense of the world didn’t have authoritative versions. They adapted to each culture in which they found themselves being told.”<sup>263</sup> To Barlow, then, culture is just as malleable and plastic as it is to Benkler, Boyle, and Lethem. Moreover, culture is language — “the basic framework within which we can comprehend anything, and through which we do so everywhere.”<sup>264</sup>

As I mentioned when I wrote about Mickunas and the “Mickunian” public domain in Part III, some of the most interesting cases of anchoring are when the term “public domain” is actually used verbatim within the external discourse, but not necessarily in the Langean sense. A second example of this is Schechner’s 1969 book “Public Domain — Essays on the Theatre.” Contrary to Mickunas, Schechner did briefly mention the Langean public domain, but the “public domain” Schechner writes about is predominantly the public nature of the theatre. To my knowledge, Schechner has not been used within the modern debate on the public domain. But his argument on the theatre as public art summarises the “finishing touch” of the social theory on the public domain that can be spotted in the last papers I have written about, i.e. work by Lessig, Benkler, and Lethem, very well. I will therefore conclude my exposition of the modern debate on the public domain by laying out what I will label the “schechnerian” argument on the value of public domain, as it is discernable in papers published in the mid-2000s.

<sup>260</sup>Barlow, “The Economy of Ideas”.

<sup>261</sup>Ibid.

<sup>262</sup>Ibid.

<sup>263</sup>Ibid.

<sup>264</sup>Benkler, *The Wealth of Networks*, p. 298.

Schechner compared the modern theatre with traditional theatres, much like Barlow compared the emerging digitilised culture with an oral tradition. While “our” theatre is entertainment, “an amusement, a pasttime, a relief from drudgery, play,” theatre in traditional culture is reality: “The theatre is a natural way to celebrate birth, puberty, marriage, the acquisition or transmission of public power, and death; to commemorate house-building, planting, harvest; to retell events of national importance and personal terror and joy.”<sup>265</sup> Lessig’s example was education, but the role of tinkering is much wider. The public domain is the stage on which we live our lives. It is where we share, tinker, and participate. But if we have no access to public domain, then it is impossible to participate. The alternative is to be the audience to a stageplay where our lives are being played out in front of us, and, possibly, amuse ourselves to death.

To Schechner, then, modern theatre is characterised by consumption of someone else’s creation, while traditional culture is characterised by participation, both interpretive and generative. In this view, the separation between idea and expression caused culture to coagulate and thicken. Schechner: “We have come to believe that ideas are something separate from the action—something that can be ‘carried’ or ‘transmitted’ by the action. In many other parts of the world, the action is the idea.”<sup>266</sup> Similar to the core argument in the public domain debate and analogous to Lethem, Lessig, and Benkler, Schechner thus argued that the “most creative ages of theatre were those in which plagiarism flourished.”<sup>267</sup> To Schechner, theatre would not find its strength again until “we remove the texts of plays from the straitjacket of copyright.”<sup>268</sup>

The same optimism that can be seen in some of the contributions to the modern debate on the public domain, especially in Benkler, can therefore be spotted in Schechner. To Schechner, we are all, or at least can be, a part of a thespian reality in which we play out our lives as a society. Schechner: “After participating in theatre (as performer or spectator) one sees and understands experience differently.”<sup>269</sup>

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<sup>265</sup>Schechner, *Public Domain*, p. 213.

<sup>266</sup>*Ibid.*, p. 213.

<sup>267</sup>*Ibid.*, p. 201.

<sup>268</sup>*Ibid.*, p. 201.

<sup>269</sup>*Ibid.*, p. 214.

## Conclusion

# Embodying Humanity

As I wrote in the introduction, the substantive problem which provided the orientation for this study was that of making intelligible what appeared to be a recurring pattern of attitudes toward public domain and the value of common access to knowledge and information on the part of American law scholars in the 1980s and 1990s, and how this pattern spread into other disciplines to form a social theory on public domain by the mid-2000s. It has been my argument that this social theory has become the analytical framework underlying the debate about the last few years' rather explosive development seen in the nature and significance of what I have called "participatory internet." To understand the debate on phenomena like Wikipedia, YouTube, blogs, social networking sites, and peer-to-peer file sharing, I believe it is necessary to look closer at the intellectual history of the public domain.

The traditional view of the traditional view of the public domain, so to speak, has been that the public domain traditionally had been seen as the flip side of intellectual property. Looking closer, however, this was not necessarily the case. As I have shown, examples of positive recognition of the value of public domain have been numerous. Between John Donne, Joseph Yates, John Dalrymple, Lord Camden, Justice Story, Justice Brandeis, and Northrop Frye, there is ample evidence of that. Still, none of these arguments on the value of availability have been a positive recognition of the value of *the* public domain, meaning a legally defined collection of information and knowledge that is available for all to use at their own discretion. Rather, they have all been an acknowledgement of the value of availability in general.

It would be more correct to say that the public domain traditionally had not been seen as under threat in the same way as it was perceived to be in the 1980s and 1990s. As such, my "numerous" examples could be interpreted as occasional and infrequent utterings of the self-evident. Such a claim would be rash, of course, but there is something to it. Contrary to the traditional view of the traditional view of the public domain, as I have called it, there seems to have been an obviousness related to the public domain that was gone in the 1960s and 1970s. When William Krasilovsky articulated the flip side-definition of public domain in 1967, his view should perhaps be seen as an attempt to grasp the new role of

the public domain prompted by the new situation of intellectual property law in the 1960s. A brief comparison with William Carman's 1954 article "The Function of the Judge and Jury" illustrates this development. There seems to have been a sense of obviousness inherent in the way Carman argued about what he called the public commons. To Carman, a justification for public domain was unnecessary. Self-assured but not arrogant, he wrote that ideas were "universal heritage" which under no circumstance should be allowed to be appropriated by private individuals.

My argument is not that this self-evidence is all there is to say about the "old" view of the public domain, or that it was unchanged throughout the seventeenth, eighteenth, nineteenth, and early twentieth centuries. Camden's words "fourteen Years is too long a Privilege for their perishable Trash," from the 1774 House of Lords case *Donaldson v. Beckett*, is more than enough proof of disagreement about issues related to public domain. Rather, it is my opinion that a positive recognition of the value of the public domain did not appear with the emergence of the modern debate on the public domain. It was much older than that, which is why I have argued that the traditional take on the intellectual history of the public domain, curiously, has failed to acknowledge the "old" in all the "new."

There remains to be said something about the reason for all of this, however. The modern debate on the public domain did not emerge from emptiness. It was the result of a number of changes in society in general. The most immediate source — or spark — was clearly changes in copyright law. But the changes in copyright law can themselves be seen as a result of the more general tendencies that later influenced the public domain debate directly. In my view, the most significant "triggers" and "intensifiers," meaning something that has both helped initiate the debate and continued to stimulate the debate, are major technological changes, changes in intellectual property law directly affecting the public domain, and what I might be so bold as to call the radicalisation of prolonged political trends.

"From the Photocopier to the iPod" would have been a nice title for a discussion on the technological revolution of the last half of the twentieth century. While a regular guy in the late nineteenth century more or less would have to travel to a city and pay a lot of money to be able to print something on paper, any 10-year-old today can choose between a wide range of options, usually including printing it at school, at one of his parents' workplace, at a friends' place, or at home. If she wanted to print it on paper at all. After all, she could just as easily publish the text on a web site, or email it to her teacher. In the movie "Love Actually," Hugh Grant's character says that "love, actually, is all around." This is

certainly no less true for information. In the movie “Information Actually,” the little, squeaky animal that always accompany the main character in Disney animations is therefore likely to say that “information, actually, is all around.”

It is interesting to note that most of the contributions to the public domain debate have been on public domain in general, despite the fact that they were at least partially motivated by digitisation. The advent of internet has certainly made the issues more pressing, but most of the arguments, especially in the first phases, were actually equally valid for culture both online and offline. It is therefore imaginable that a public domain discourse could have arisen even without the internet, sparked only by changes in intellectual property law. But it would not have been as momentous.

Intellectual property law has never been as extensive as in the late twentieth century, neither in scope nor in strength. Expansions of copyright term length, introduction of process patents, patentability of microorganisms, and, especially, the globalisation of western-style intellectual property rights through the Trips-agreement, have all increased the immediacy of infringement. As both Lawrence Lessig and James Boyle have argued, it used to be hard to violate copyright. It was close to impossible to infringe inadvertently. With new technology such as photocopiers, video recorders, compact cassettes, and, not least, computers and mp3-players, it is hard to get through a whole day *without* infringing.

Both technological changes and expansions of intellectual property law have continually triggered reactions and countermovements, which has kindled the study of the public domain. In addition to this, marketisation has both supported the expansions of intellectual property and been an analytical challenge to the study of public domain. To the neoliberalist, it seems as if inspiration has no value. The muses are as dead as God was dead to Nietzsche. Just as the Age of Reason and modernity put an end to faith in a theistic cosmic order and Nietzsche claimed that God is “dead” because God is a myth, a neoliberalist would probably claim that the Muses are Dead because the existence of Muses is a myth. The result is that the value of the inspiration of the “author” and the raw material he uses is consistently downplayed.

The relationship between the phrases “God is Dead” and “The Muses are Dead” is stronger than merely being analogies. The establishment of intellectual property rights is firmly related to the individualism of modernity. Recognising the “author” as the single proprietor of a work could hardly have happened in Antiquity or the Middle Ages. Moreover, the muses are just as dead to a marxist as to a neoliberalist. The rejection of divine inspiration is a faustian trait of modernity

as a whole, which is why I have argued that the modern debate on the public domain has been instigated by the radicalisation of some of the traits recognised in the more general political trends belonging to modernity.

When the participants in the modern debate on the public domain searched for arguments that would back their claims as to the value of accessibility and reuse, they therefore found a wellspring of reasoning in the critique of both marketisation and modernity. Through deconstruction of notions inherent in intellectual property law that were seen as precluding an accurate understanding of the public domain, an embedding of new concepts by anchoring their use of the concepts to the external discourses the concepts originated in, and a realisation of the potential created by these processes, a social theory of public domain was constructed. Not *the* public domain, meaning a narrow, legally defined area of knowledge and information strictly separated from both creative commons and intellectual property rights, but public domain, meaning a broad understanding of, using Benkler's words, "sharing nicely."

In the late 1990s and early 2000s, then, outlines, preliminary notions, and components to a social theory on public domain were brought to the table. My argument is that all the elements necessary to create such a theory had been presented by the mid-2000s, even though it had not reached the level where it was possible, as Frye would have said, to write "an elementary textbook expounding its fundamental principle." The modern debate on the public domain has had no "Silent Spring," and no "Communist Manifesto" has been written. But a shared understanding of the value of public domain was evident. The desired transformation of our culture is the transformation from a "cut and paste culture," where actors such as Disney are allowed to cut out and remove art and knowledge from our common culture, to a "copy and paste culture," where actors such as Kutiman and Alice Randall are allowed to copy from our common culture to create more. The work of art is not brought to life by creative genius working in isolation, it is argued, but as a patchwork or a bricolage of human life.

The core of this social theory is the value of reuse. But not only to insure production. Reuse is important because art reusing other's art is seen as more beautiful; because the organisation of society will improve the more people are allowed to participate in the political processes; and because reuse is more efficient economically speaking — or should everybody invent their own wheels?

Based on Benjamin's dichotomy of the passive absorber of meaning and the active participant in society, we can deduce a corresponding dichotomy of the function of art in society: The mechanically reproduced work of art can either be

a tool to suppress a community (if people are passive absorbers), or an instrument able to uncover wrongful assumptions (if people are active participants). To Lethem, however, the question of which of these two is the correct is not an empirical one, but a question of social policy. To people like Lethem and Lessig, the function of art in a permission culture is as a tool to suppress a community, while the function of art in a free culture is as an instrument able to uncover wrongful assumptions.

If we are not allowed to reuse, the argument goes, we will not be able to understand the culture we are a part of. As early as 1967, Benjamin Kaplan wrote that “education, after all, proceeds from a kind of mimicry, and ‘progress,’ if it is not entirely an illusion, depends on generous indulgence of copying.”<sup>270</sup> Not only do we learn about technology by playing around with gadgets, we learn about everything by playing around with, well, everything. Just as we learn about literature by writing our own (bad) prose, we learn about music by trying to play a guitar or sing a song. We learn about images by playing around with cameras and camcorders; we learn about technology by playing around with gadgets; we learn about society by playing around with each other.

Imagine a child that never quite mastered the black and white keys of a piano, but learned how music is created. Or the students of international relations learning about the United Nations through role-playing games emulating the security council. In school, children demystify the theatrics of theater by enacting their own stageplays and conquer the stage themselves. In the same “Love Actually,” the children insists that there should be an octopus in the nativity play. To them, the nativity play is within their grasp. They can change it. It is rewritable. They are not passive consumers of a culture created in a studio far away, they are participants of their own society.

Curiously, even the story about Faust has been written by three separate, modern authors — retold a thousand times. When Andrew Lipton and Daniel Shiu recreated Escher’s 1953 lithography “Relativity” using Lego pieces in 2003, did they infringe on Escher’s copyright or create a magnificent piece of art resembling Escher’s “Relativity”? Was Kutiman’s collage merely a rip-off? Alice Randall’s novel a swindle? As Richard Schechner wrote, “there is a special beauty in an art whose extraordinary complexity precludes a uniquely personal creativity.”<sup>271</sup> It embodies humanity.

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<sup>270</sup>Kaplan, “An Unhurried View of Copyright”, p. 2.

<sup>271</sup>Schechner, *Public Domain*, p. 201.



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